IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 145.

WILLIAM W. STEWART, APPELLANT,

vs.

LEWIS A. GRIFFIFTH, EXECUTOR, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (Trans. Rec. 399) reversing a decree of the lower court dismissing a bill filed by the appellee Griffith as executor of the estate of one Alfred Ball, deceased, seeking to compel appellant Stewart to perform specifically a contract he had made purchasing certain land in Maryland belonging to Alfred Ball. The trial court originally had signed a decree of specific performance in favor of appellee Griffith (Rec. 329), but opened the case on affidavits of handwriting experts (Rec. 344) that the decedent Ball had not signed certain papers in order testimony on this point might be

taken (Rec. 367). The trial court on rehearing found the new testimony and the alleged impeachment of Ball's handwriting without merit but permitted argument anew on certain law points and reversed its former decree and dismissed the bill on the ground "alone" as set forth in its decree (Rec. 369) by order of the trial justice that the heirs of Ball were indispensable parties to the proceedings. The Court of Appeals held on appeal the heirs were not proper parties and directed reinstatement of the original decree (Rec. 399) from which action appellant noted the present appeal.

Statement of the Case.

The case at bar is a suit by appellee Griffith as executor of Alfred W. Ball to compel the appellant Stewart to perform specifically an agreement whereby he purchased the farm of Ball in Prince George County, Maryland, in June, 1903, at $40 an acre, paying $500 down and agreeing to pay the balance of one-half of the purchase price, the farm meanwhile to be surveyed and acreage ascertained, on or before November 7, 1903, and at the same time to give a purchase money mortgage for the remainder of the total computed purchase price (Trans. Rec., p. 11). At the time sale was made drilling for oil was progressing on the farm adjoining Ball's. The well proved to be dry, and appellant refusing to take the land, suit was brought to compel him to receive the title and pay the purchase price.

The bill in equity alleged that in June, 1903, Alfred W. Ball owned a farm in fee-simple in Prince George County, Maryland (Rec., p. 2), and that it then having a salable value based on the supposed existence of oil on the tract, Ball was approached by the appellant (defend-

ant below) who wanted to buy the farm. Ball, being of little education, placed its sale in the hands of his family physician, the appellee here (Rec., p. 45), giving him a power of attorney to sell for not less than $35 an acre (Rec., p. 9). Appellee sold for $40 an acre to appellant who, on June 5, 1903, signed an agreement of purchase, paying $500 down as part purchase price and binding himself to pay the remainder of one-half of the purchase price on or before November 7, 1903, and to secure the balance of the purchase price by interest bearing purchase money mortgage notes. The agreement provided (Rec., pp. 11 and 12) that the land should be surveyed and paid for at $40 per acre, according to the number of acres found by the survey. The farm had been estimated to contain 240 acres more or less, but appellee stated to appellant that Ball claimed that while it was assessed as containing only 240 acres, it contained really nearer 275 acres (Rec., p. 49). Both parties agreed to abide by the survey. The final agreement provided that the title should be searched by J. K. Roberts, an attorney of Prince George County, Maryland, and that proper deeds of conveyance and an abstract showing a good title should be made by Roberts. Each party to the sale was to pay one-half of the price of title searching and surveying and likewise one-half of the taxes for the year 1903. The agreement provided that in case the first half of purchase price was not paid by November 7th, that then the $500 paid as part purchase price "is to be forfeited, and the contract of sale and conveyance to be null and void and of no effect, otherwise remain and be in full force." Ball was to have the possessory right to the premises until November 7th. The sale was made by Ball under a power of attorney given by him to appellant, and subsequently the sale was

ratified by Ball. The bill averred that Ball always stood ready to keep the agreement; that Ball died the night of November 5-6; that by his will appellee was vested with full and complete power over the entire estate, real, personal and mixed, of Ball; that the Probate Court of Prince George County, Maryland, had authorized appellee as Ball's executor to carry out the contract made and ratified by Ball in his lifetime; that demand had been made on appellant to perform his contract specifically, and that he had refused to do so.

The appellant first demurred to the bill, and when his demurrer was overruled (Rec., p. 37), answered, affirming (Rec., p. 39), that while the land was purchased in his name, it was known to appellee he was only the nominal purchaser, the real purchaser being a company known as the Maryland Oil & Development Company; that the agreement was not a sale or agreement of sale, but an option contract; that the appellee as executor had no right to maintain the suit; that the contract became null and void on the death of Ball; that appellee and appellant on November 10th had ended the contract and that appellant refused to revive it; that the title was defective; that no survey was made in Ball's lifetime; that the land contained more than the agreed acreage; that the title was not good; that the price of $40 an acre was exorbitant, and that appellee had a good remedy at law.

The evidence taken in the case shows that appellant Stewart is a lawyer, and had been a dentist and an industrial boomer or promoter (pp. 173, 4 and 9). He was interested by one A. W. Thomas and others in buying lands for oil exploitation in Prince George County, and became president of a company that obtained title to a tract of more than a thousand acres of land adjoin-

ing the land in controversy, and leases on many other tracts in the county at a distance from the oil tract proper. Stewart also personally purchased several farms separated from the oil tract proper held by the company only by the intervening A. W. Ball farm in controversy (p. 172). After these company lands and also the personal lands of appellant, bought on his (Stewart's) personal account and not for the company, had been purchased, drilling for oil was begun on the oil tract proper at not a great distance from the land in controversy. The result was quite an advance in land values. Appellant and those associated with him tried to lease the land in controversy from Ball, who, with his brother, James T. Ball, both unmarried, then lived on the land, as his father had before him, but Ball refused. The Ball farm was considered as highly desirable territory if oil were struck. The Balls would not deal with a cattle trader named Leapley, sent by appellant to deal with them, and told him to see appellee Griffith, who is a country doctor, and had been one of the judges of the County Probate Court, and for five or six years had attended the Balls, who were illiterate, lived a retired life, and knew nothing of business.

Leapley introduced appellee to appellant. Leapley, whose reputation for truth and veracity, according to the testimony of a Methodist minister, a lawyer, and two farmers of his community, is bad, testified he introduced appellee as president of the oil company which was boring for oil, and appellant also so testified. Appellee on the contrary testified appellant was introduced simply as Dr. Stewart, of Washington, that he did not know who were the officers of the oil company, and never had been then or up to the time of the pending trial, to the scene of the oil well drilling. Leapley before this had told appellee that

Stewart wanted to buy the property, and several times while appellee was attending the Ball brothers in the spring of 1903 they had asked appellee to sell the place for them, and Alfred Ball had told him of Leapley's visit.

Early in June, 1903, and after Griffith's talk with Leapley, Stewart and Leapley hunted up Griffith at his home in Marlboro and opened negotiations (p. 88) for the purchase of the Ball farm in controversy. The fact that Griffith had no power of attorney as yet authorizing him to sell the property was mentioned. The testimony differs as to who first brought up this fact, but the difference is not material, as the recognized importance of its procurement is conceded. Stewart inquired the price. Leapley says it was $10,000 that was named at Griffith's house (p. 89). Stewart says $10,000 was mentioned by Griffith and 240 acres as the land area at the house, and that it was changed to $40 an acre, without any statement of a larger acreage, at the house of Ball, while Griffith says he told Stewart Ball claimed there were nearer 275 acres than 240, that it was agreed by both parties the farm should go as a whole according to the acreage as found by a survey agreed to be made, and that only an acre price ever was talked of, though the statement may have been made the cost would be in the neighborhood of $10,000. Stewart, after the price was named, inquired as to the terms. Griffith demanded $500 down and the balance necessary to make up one-half of the purchase money in three months; whereas Stewart's desires were $250 down and six months' time for the balance of one-half. The talk ended in an agreement that Griffith should get a power of attorney from the Balls (p. 88) as a necessary preliminary and should talk with the Balls as to

terms. Griffith parted from Leapley and Stewart with the understanding they should meet at Meadows Post-Office, also called Centerville, a half mile from Balls and several miles from Marlboro, at 4 o'clock that afternoon, Griffith meanwhile to do what was agreed. He had Joseph K. Roberts, a Marlboro lawyer, who had examined titles for Stewart and his oil associates prior to this time, draft the power or powers of attorney, and then, in company with J. Alfred Ridgeley, justice of the peace of Marlboro, drove to Ball's house. There Ball signed two powers of attorney (pp. 53, 71 and 295), differing only in that one mentioned the commission that Griffith should get for making the sale, and the other making no mention thereof. Justice of the Peace Ridgeley took Ball's acknowledgment to both powers of attorney. The power of attorney with the commission appears in the Record on pages 9 and 10, and the other power of attorney, appellee alleges, he later gave to A. W. Thomas, agent and attorney for Stewart, which statement Thomas denies. Later Ridgeley took a third power of attorney known as the Jim Ball power of attorney from Alfred Ball, but it relates to other land than that in controversy, being land left by Jim to Alfred.

Before the business at Ball's house was hardly completed, Appellant Stewart and Leapley drove up to Ball's house, not waiting at Centerville, as they had agreed. Griffith informed Stewart that Ball had given him a power of attorney, but it was not called for or shown at this time (p. 52). They talked a short time apart from Leapley and Ridgeley. Stewart says it was at this time the price was definitely fixed at $40 an acre, instead of $10,000, while Griffith states the price was always an acre price of $40 an acre but it was stated it would amount to

about $10,000. The price, as shown by the signed contract, was $40 an acre, and the acreage 240 acres more or less, but the price, as set forth in the signed contract (p. 309), to be based on the acreage as the survey might show. Griffith stated to Stewart in this interview that the Balls objected to a cash-down payment of less than $500, and said that much would have to be paid down and the balance necesary to make up one-half of the total purchase price in five months. Stewart replied that was all right and the property was his, and then it was agreed Stewart should have until the following Monday to pay the $500 and sign the agreement. Prior to this agreement there had been talk about the quantity of land. Griffith says Stewart remarked the tract contained about 240 acres, but he (Griffith) replied (p. 49) he thought the assessment books would show about 240 acres, but that Ball always said there were nearer 275 acres. Stewart had responded that the matter would be settled then by a survey (see deed, p. 309). A burial place acre was to be reserved, and some small parcels had been sold off. Griffith testified that Stewart wanted the entire tract, even to the burial ground of one acre of the Ball family, and that the final agreement was to have a survey in order to fix the price according to the survey, which was to be made in the interval allowed for payment of the balance of one-half of the purchase price, the title also to be examined meanwhile. Stewart testified the survey was agreed on because the Balls had sold off a few acres and because it was necessary to mark the boundaries of the farm.

Although Stewart had until Monday to make the down payment of $500, he did not wait his agreed time, but the down payment was made the next day, one A. W. Thomas making the payment, with Dr. Stewart's personal check

(see check on page 47). The testimony as to whether appellant believed he was dealing with Stewart personally or with the oil company, known as the Maryland Oil & Development Company, is substantially as follows:

Appellee testified (p. 53) that prior to the time he made the sale nothing was said to him as to Stewart representing anybody but himself, that Leapley merely told him Stewart wanted to buy the property and that he never heard of an oil company in connection with the purchase until about October 15, 1903, when he called on Stewart about having the property surveyed, and Stewart asked him not to agitate the matter, saying for the first time he had promised to let the oil people have the property at just what he had paid for it if they wanted it when the payment was to be made in November, but that he had bought it for himself, and if Griffith would hold off, he (Stewart) would pay him a thousand dollars or any reasonable amount and then have it surveyed, because if the oil people did not meet their obligation in November his word would be kept, and if oil did not materialize he would sell the farm off in lots to settlers. He reluctantly assented to the proposition, and, after consulting Ball, agreed to make no further move until November 7. He had no knowledge the consideration money or the money received to pay one half the taxes was not Stewart's; he had received Stewart's personal check for these payments and not checks from any oil company.

Leapley testified (p. 88) that he told Griffith he was acting for the Maryland Oil & Development Company and that he would bring the company's president down to deal with him. He had introduced Stewart as president of and as representing the oil company. Stewart testified (p. 151) Leapley introduced him as Dr. Stewart, presi-

dent of the Maryland Oil & Development Company. Griffith explicitly denied this testimony was true (p. 235) The verbal agreement at the Ball farm was followed by the appearance of A. W. Thomas at Marlboro the next morning (the evidence leaves it possible, however, that a day may have elapsed, though Dr. Stewart's testimony is that it was the next day). Thomas testified (p. 104) that he had been secretary of the Maryland Oil & Development Company from its beginning, and since 1901 his office and the company's had been in the same building with Dr. Stewart. Stewart was president of the company in June, being succeeded in July by one Lucas. Over objection of appellee as incompetent, records of the Maryland Oil & Development Company, in the form of loose leaves, were put in evidence, showing Dr. Stewart had advanced the oil company $100 with which to make the first payment on the land in controversy, the company having only $400 in bank.

A. W. Thomas, witness for appellee Thomas, who had been a lawyer in several States, testified that Stewart had reported to an executive committee of the oil company the morning after the interview with Griffith at the Ball farm. It was decided to send witness, who was the company's attorney, to Marlboro to close the deal. Witness was given a certified check for $500, dated June 5, 1903, signed by W. W. Stewart personally (p. 105) and payable to the order of L. A. Griffith as agent for A. W. Ball and brother. At the same time the company had made Stewart a check for $400, and on July 16 repaid Stewart the other $100 along with certain other advances. Appellee objected to this testimony as to private dealings between appellant and the oil company to which he was not a party directly or indirectly. Thomas found Griffith

in his office at Marlboro (p. 111) and "told him that I came down to carry out the agreement made by Stewart with him in reference to the Ball land and showed him the check for $500." Witness drafted the contract, and while he was finishing it Griffith went out to find Mr. Latimer, who was to survey the farm, and Mr. Roberts, who was to examine the title. Witness had handed Griffith a business card giving his name as A. W. Thomas, attorney and counselor-at-law, Washington, D. C., and called Griffith's attention to the fact he had offices in the Stewart building, being secretary of the Maryland (p. 112) Oil & Development Company. As witness was leaving for home he said, "Dr. Griffith, if people talk about this I wish you would make them believe that this is a lease, if you can, because if it is known that the company buys any lands they won't lease any more and so we will have to buy all instead of leases." Witness said the company and, of course, meant the oil company. He said this just as about to enter the carriage, and Griffith replied "all right." The contracts had been offered in evidence. They consisted of a duplicate written contract or deed (p. 308) dated June 5, 1903, signed and purporting to be made by "L. A. Griffith, agent for A. W. Ball" and by "A. W. Thomas, agent for W. W. Stewart," and a typewritten contract or deed (superseding the written contract or deed) dated June 5, 1903, purporting to be between (p. 10) "L. A. Griffith, duly authorized agent and attorney under a certain power of attorney from Alfred W. Ball, both of Prince George County, Maryland, parties of the first part, and Wm. W. Stewart, of Washington City, D. C., of the second part," signed by "L. A. Griffith, Agent. Wm. W. Stewart"—this latter document (p. 114) by agreement having been brought to Washington

by lawyer Roberts June 6th for Stewart's personal signature.

Vincent Richardson testified (p. 83) he had been employed on the Ball place first by Alfred Ball and later by Griffith. Witness had stopped Stewart, who was hunting on the place, and Stewart replied he had a right to hunt on his own place. Leapley, Richardson said, had tried to buy the place from Ball for $40 an acre. Stewart later denied this conversation was as stated by the witness.

A. W. Thomas testified (p. 14) that the contract had been entered into in Stewart's name instead of the oil company's as a result of a talk between witness, Stewart and the company's executive committee as, if it were known the oil company had bought the Ball land, the people would not lease but would want to sell. On cross-examination witness testified that Griffith knew him personally and knew he was secretary of the oil company (Griffith denies this, and the statement was based on the fact some months before Griffith had casually met him on the road, and Thomas claims it was then said he was connected with the company. See pages 110, 145 and 234).

When he saw Griffith (p. 125) witness showed him the check and told him "I came down there to carry out the arrangement made by Dr. Stewart with him in reference to the Ball land." Asked if he had a letter or anything of the sort from Dr. Stewart to Dr. Griffith accrediting him, witness replied he thought he had a note of some kind, but he could not remember anything as to its contents except it was very brief (see p. 125). After several questions as to why the company's check was not used, witness replied because the object was "that the

check should not be the company's check," and they did not want the fact the company was purchasing to become known by the check passing through the bank. He supposed Griffith knew Stewart was not the real purchaser and that the signed paper "was drawn with reference to the understanding had by Dr. Stewart and Dr. Griffith." He had no personal knowledge of such an understanding. Asked why he should have apprised Griffith the oil company was buying, Thomas replied he did not recollect testifying that he said directly that he apprised Griffith the oil company was buying; he supposed Stewart had all that arranged.

He had not said he represented anybody as attorney, but simply that he came down there to carry out the understanding with Dr. Stewart. The check and the note all had been hurriedly done (p. 129).

Appellant Stewart testified that he was president of the oil company until July, 1903. Leapley had introduced him to Griffith as president of the company (p. 151) and after the talk with Griffith at Ball's, he called his executive committee together the next morning. The committee suggested his name should be used instead of the company's, so the public would not know of it. He advanced the company $100; at that time they supposed the Ball brothers owned the tract, and witness' check was used by Thomas, to whom witness gave letter. Appelant (defendant below) called on appellee to produce the letter (p. 154), but appellee refusing to say if they had it on the ground appellant wanted it before committting himself. Witness said he could not remember its phraseology, but he may have said Thomas was his attorney. His recollection was he did. He had previously indicated to Griffith the oil company was buying.

At the next session the appellee offered in evidence (p. 159) the following letter:

WM. W. STEWART, Attorney-at-Law, Etc.

Dr. L. A. Griffith, Upper Marlboro, Md.

Dear Sir: I am obliged to go out of the city to-day, and I herewith send my attorney, Mr. A. W. Thomas, with my certified check for $500 to complete purchase as agreed upon with you yesterday for the Ball tract, balance of payments to be made according to understanding had with you.

W. W. STEWART.

On cross-examination witness testified (p. 176) that it might be he saw Griffith at Ball's farm at 4 o'clock Thursday, June 4, and that Thomas was at Marlboro before noon the next day. Thomas had driven the 18 miles. He denied he had made the contract and that then the oil company had taken over the deal. He had first asked Griffith to lease to the Maryland Oil & Development Company, and Griffith had replied he did not think the Balls would lease. He had stated when Griffith named terms that it was the oil company's money and not his, and that he would have to bring the matter before the company before the thing would be a go. The whole matter was done in a hurry, and the committee's meeting might have occurred as early as 8 o'clock in the morning, because it was summer and "we were up and doing and everything was alive." He was not at that time as anxious to make the deal as Mr. Thomas and the executive committee. He knew Dr. Griffith was a country doctor, whose practice took him into the homes of all the people. Asked why he disclosed the real principal (p. 179) to

Griffith, witness said: "That is my method of doing business. I always tell people what I mean and what I am going to do, and I do what I say I will do." The note of introduction was written by somebody else while he was up in his office, it was drawn hurriedly, and there had been a full understanding between himself and Griffith as to the proper parties. The letter of introduction was of no significance (p. 191) and Thomas was merely to carry out his (appellant's) arrangements with Griffith. No authority had been exhibited to Griffith (p. 198) that witness had the right to act for the oil company other than witness' statement, and none was asked. All leases and purchases of the company other than this one were taken in the name of the company and all witness' personal dealings in buying land on his personal account in the neighborhood were in his own name.

Frederick Briggs testified that he was one of the executive committee of the Maryland Oil & Development Company (p. 206), and that it had authorized Dr. Stewart to buy the land in controversy, that Dr. Stewart had advanced the company $100, and Stewart's check and a letter of introduction had been given Thomas. Witness as treasurer had reimbursed Stewart his advances and expenses. On cross-examination he testified that he remembered the dates of the executive committee meetings as June 4 and 5, because on July 14 he had become treasurer, and two days later had paid a bill of Stewart's and this had enabled him to remember a date a month previously. Witness said that prior to testifying he had looked over the testimony previously given, whereupon a motion was made to strike out his testimony.

Over objection George K. Flynn and Elisha Ferguson, for appellant, testified (p. 211) to having talked with Alfred Ball after the sale, and to Ball saying he had sold

to an oil company. Several witnesses testified the reputation of these witnesses for truth and veracity was bad James Herrison testified Ball had said (p. 217) he had sold his property and had received $500 on it, but did not say who had bought it. James Branson testified that Ball had told him before the deal that the oil company was negotiating for his land, that the only way he would sell would be to sell an option, and that later he had said the oil company had paid $500, and if they did not pay the balance the contract became void. On cross-examination he said the conversation occurred in the month of May, 1904, and insisted it was last year he had talked with Ball. He did not know Ball had died before this time he named. It might be he had talked with Flynn and Ferguson in a saloon since their testimony, but not as to their evidence.

Rene Baughman (p. 219) testified that Dr. Stewart had loaned the Maryland Oil & Development Company $100, and Mr. Thomas was authorized to close out the deal for the company that Dr. Stewart had made with Griffith. On cross-examination witness said there was discussed at the executive committee meeting the advisability of making the purchase and also the advisability of concealing the fact the company was to be the real purchaser. Mr. Thomas prepared and Dr. Stewart signed the letter of introduction. The letter was discussed (p. 223) after its preparation and the advisability of stating in it that Mr. Thomas was going as the agent of the Maryland Oil & Development Company. He could not remember whether it was decided advisable not to put in the letter anything concerning the Maryland Oil & Development Company. He knew the whole transaction was to conceal the company's identity from the general

public, not from the principal, but why the identity could be mentioned verbally and not in that letter he did not know.

In rebuttal Scott Armstrong (p. 229) testified that as school trustee in the autumn of 1903 he had sought to buy a lot out of the Ball tract for a school house, and had asked Dr. Stewart if he had bought the place individually or for the company, and Stewart had told him he bought it individually and not for the company.

Everett Pumphrey (p. 249) testified that he lived near Ball and had heard Alfred Ball say before his death he had $500 of the oil company's money, and he did not care whether they took the property or not. This was about a week before Ball's death. Asked on cross-examination if when outside the Stewart building at a previous session of testimony he had not said to Mr. Merillat he knew nothing about the deal and that he never had heard Alfred Ball talk about it at all, witness replied he had said he knew nothing about the case, but denied he had been asked if he had heard Alfred Ball say anything about it. Witness kept a bar on the pike and had been arrested for assault, for selling liquor on Sunday, for selling a tuberculous cow and giving a bad check, but it was shown his check was good. He had come to testify at Leapley's request. He did not know whether he had witnessed Ball's will and if there were an affidavit of his on file stating he had it was wrong.

Mr. Merillat and appellee testified Pumphrey had told them when asked the direct question that he had not beard Ball talk about the matter.

For appellee (complainant below) Mrs. Anna I. Meloy (p. 253) testified she was distantly connected with the Balls, but not interested in the estate, and the day James Ball was buried she had asked Alfred if he had sold his

place; he said yes, and she asked if to the oil company. He replied that he had sold to Dr. Stewart. George S. Harrison, farmer and election registration officer, testified when coming up to register Ball had said Griffith had sold his place for him to Dr. Stewart, and on the rehearing a number of other witness testified to the same effect.

After the manuscript papers prepared by A. W. Thomas had been signed by Thomas and Griffith they were typewritten by Attorney J. K. Roberts, of Marlboro, with some modifications, and the typewritten copy signed by Griffith. Roberts brought it to Washington the next day, June 6, where after being compared by Roberts and Thomas it was signed by Stewart personally. Mr. Thomas testified (p. 115) that Roberts, in his testimony, evidently had forgotten this meeting and testified that Roberts had said he understood that the oil company was the real purchaser. Witness had replied yes, and Roberts said he supposed they would pay one-half of his fee. Witness had replied certainly, but they didn't want anything said about that, and Roberts had replied all right. Dr. Stewart was in a hurry when he came in to sign. Stewart also said to Roberts it was the oil company's money. There was introduced in evidence (p. 116) a bill dated June 13, 1903, by Roberts to the Maryland Oil & Development Company for one-half of the fee for examining the title. The bill was enclosed with an abstract of title. Dr. Stewart testified (p. 155) that he had said to Roberts he was only acting for the Maryland Oil & Development Company, and Roberts replied certainly he understood that. In rebuttal Roberts testified (p. 241) he had no recollection of Thomas saying to him an oil company was the real purchaser, and for that reason had testified in his direct examination that he never had heard

of the oil company. Prior to coming to Washington June 6 with the typewritten agreement he had no knowledge this was the oil company's deal. He kept regular books of account and there was put in evidence (p. 242) from Roberts' book an account made contemporaneously, charging Griffith and Ball with half and Dr. W. W. Stewart with the other half of the fee of $50 agreed on.

Subsequent to the agreement taxes fell due and there was introduced in evidence (p. 109) a check dated Sept. 10, 1903, by W. W. Stewart, personally, to Dr. L. A. Griffith for $8.26 in payment of one-half of the taxes for the year, and the defense introduced a check of the same date by the Maryland Oil & Development Company to Stewart for the same amount to recoup appellant for his payment to appellee.

Some correspondence followed the agreement and there was introduced in evidence (p. 156 et seq.) postal cards and letters from Griffith to Stewart dated in September and November 5 and 7, all concerning the Ball farm sale. Each was addressed to W. W. Stewart personally and none made any mention of the oil company.

Dr. Griffith testified (p. 54) that the first he ever heard of an oil company was about the 15th of October, when one day he had called on Stewart regarding having the property surveyed, and Stewart "told me then for the first time that he had promised the oil people to let them have this property at just what he had paid for it if they wanted it when the payment was to be made for it in November, but that he did not want them to have it, he had bought it for himself and wanted to keep it himself, and if I would just let the matter drop or hold off he would pay me a thousand dollars or any reasonable amount I would specify, and then have the property surveyed, be-

cause his word would be kept with the oil people, and if they did not meet their obligation in November that he would be under no further obligations; that if the oil did not materialize there, that he expected to divide that property and sell it off into lots for settlers to go into that neighborhood. I reluctantly consented to the proposition and agreed after consultation with Mr. Ball to wait until the 7th of November before we made any further move. I don't think that I had any more conversations in which the oil company was mentioned until after the death of Mr. Ball." After the death of Ball (p. 56) Stewart had said to him "You know that I bought this for the oil company." He had replied: "I know nothing of the kind." Stewart then had told him to go ahead and sell and forfeit the company's $500, and he had replied he had nothing to do with an oil company and would look to Stewart exclusively.

Dr. Stewart testified (p. 157) he was out of the city from October 10 to November 1. Griffith had made some short pop calls on him before October and had wanted to know what the company would do, and he had replied he did not know that it depended wholly on the company's prospects; Dr. Griffith in rebuttal (p. 235-7) squarely denying the truth of this testimony of Dr. Stewart. On November 9, after Ball's death, he (Stewart) had asked Griffith if that did not complicate matters. Griffith replied no; witness had said he thought it did, but as it concerned the oil company alone he would let the company decide. On November 10 he had received a letter which was put in evidence (p. 162) from Griffith saying he had consulted lawyers and was satisfied he (Griffith) was fully authorized to complete the sale, and asking to be advised by the 16th what witness intended

to do, and stating if satisfactory arrangements were not made before then he could consider the matter ended. Witness took no further steps and considered the matter finally ended, especially after the company did not put up any money on the 16th, which he knew they would not. He felt much elated the matter was settled.

There was next put in evidence a letter from Wm. W. Stewart to Dr. L. A. Griffith, dated Nov. 23, 1903 (p. 164), stating the agreement was entered into for the *Maryland Oil & Development Company,* and that he (Stewart) assumed no personal liability regarding it. Also a reply dated Nov. 24, from L. A. Griffith to W. W. Stewart stating he knew nothing of any company, that his business was with Stewart and "I *shall deal with you.*" Also a letter (p. 117) from "A. W. Thomas, Atty. for Maryland Oil & Development Company," dated Nov. 23, 1903, to J. K. Roberts, objecting to the title now Ball was dead, and stating he had advised the *Maryland Oil & Development Company,* the real party to the agreement, that it should stand pending completion of perfect title.

Dr. Stewart testified (p. 165) he had written his letter after getting word of an Orphans' Court order somewhere between November 17 and 22 looking to completion of the matter. He had complained to the executive committee he was placed in an embarrassing position, as he could not help Griffith writing letters or prevent Thomas demanding title. He was between the devil and the deep sea.

Dr. Griffith testified (p. 237) that he had written Stewart the letter of November 10, 1903, because, while he had no authority at the time to act, he wanted something definite to bring before the Orphans' Court when the will was admitted to probate and he would qualify as executor.

He did not know Stewart was worth any property and he had another offer, but he saw a lawyer, J. K. Roberts, before Court assembled and was told nobody had any right to violate that contract, and that he would only bring on a lawsuit if he attempted to dispose of the property except to Dr. Stewart under the contract. The matter was then put into the hands of the Orphans' Court. Mr. Roberts testified (p. 245) that he had advised Dr. Griffith, now Ball was dead, he could act only under the orders of the Orphans' Court and had no power himself in the premises.

December 8th an interview occurred between Dr. Griffith and Attorney Wm. E. Ambrose and Wm. W. Stewart and A. W. Thomas. The record shows the latter two claimed Stewart had then said that it was the oil company's matter and thereafter had nothing to do with the negotiations, while the two former testified Stewart made no such statement and did take part in the negotiations and stated he (Stewart) had no purpose except to take the property himself if the title was made perfect (pp. 57, 59, 119, 120, 166, 200, 247).

The interview between Dr. Griffith and A. W. Thomas, at which the latter presented Dr. Stewart's letter of introduction and personal check, resulted in A. W. Thomas drafting two manuscript copies of an agreement of sale. The evidence regarding the powers of attorney given by Ball to Griffith was substantially as follows: Dr. Griffith testified (p. 49) that just before Stewart drove up to Ball's house as he (Griffith) was coming out, Alfred Ball, whom he had ascertained to be the sole owner, and not the Ball brothers, as he had supposed previously, had signed two powers of attorney empowering Griffith to sell the land (p. 52). He had told Ball of his interview that

day with Stewart. He had informed Stewart when he came out of Ball's house that he had a power of attorney, but did not show him it. The power of attorney had been procured as the result of his talk with Stewart that forenoon. The powers of attorney were identical, except that one of them contained the commission he (Griffith) was to receive. This power of attorney (p. 9), known as the long power of attorney, appointed Griffith Alfred Ball's agent and attorney to negotiate for the sale and transfer of the land in controversy at not less than $35 per acre, Griffith's commission to be whatever was realized above this sum. Ball agreed to sign the contract in writing ratifying and approving the sale, provided he was paid $400 and that the sale should be consummated within 150 days by payment by the purchaser of one-half of the whole purchase money. At that time Alfred Ball owned no property except the farm in controversy; although later his brother James had died leaving him a farm James had in the county. The powers of attorney conferred no authority to give an option.

After Thomas had given Griffith (p. 52) Stewart's personal check, Griffith testified he gave Thomas the power of attorney that Ball had signed which did not include witness' commission, Thomas almost at the beginning asking for it. After getting the power of attorney, Thomas had remarked it was from A. W. Ball, and witness had told him no one else had any interest in it. Thomas replied that was satisfactory entirely and then had proceeded to draw the manuscript contracts.

The manuscript contracts drawn by Thomas were in duplicate. Appellee (plaintiff below) offered one in evidence (p. 308). By it, "L. A. Griffith, Agent for A. W. Ball," and "A. W. Thomas, Agent for W. W. Stewart,"

the witness being J. K. Roberts, agreed that Stewart had paid to Griffith, agent, $500 "part purchase price of the total sum to be paid for a certain tract of land owned by said Alfred W. Ball near Centerville, Prince George County, Maryland, containing 240 acres, more or less, at the rate of $40 per acre." Griffith as agent "grants, bargains and sells, and agrees to convey by proper deed in fee-simple free of all encumbrances of every nature, duly executed by said Ball to said Stewart said 240 acres of land," the balance of one-half of the purchase price to be paid on November 7, 1903, and the remainder secured by purchase money mortgage, notes to be given by Stewart and his wife. The land was described as "the same tract or parcels of land whereon the said Alfred W. Ball now resides," and a conditional reservation of one acre for the Ball burial ground was made. "The said land is to be surveyed and plat made thereof and the total purchase price is to be at the rate of $40 per acre as determined by said survey"—each party to pay half costs of survey. Proper deeds "and abstract of title of said land, and title search therefor, to be made showing clear unincumbered fee-simple title in said lands in said grantor Ball"—and the parties contracting each to bear half of title costs." In case the remainder of the first half of said purchase price is not paid on November 7, 1903, then the $500 paid "is to be forfeited, and the contract of sale and conveyance to be null and void, otherwise to remain in full effect according to the terms and tenor hereof."

This manuscript agreement was put into final shape by Attorney J. K. Roberts, who typewrote the same and then, after it had been signed by Griffith, took it on June 6 to Washington, where it was compared by Roberts and Thomas and then signed by Stewart in person. The

typewritten agreement (p. 11) differs in phraseology in several respects from the manuscript agreement. The chief changes are that near the beginning it added to the description of the land sold as that owned by Alfred Ball near Meadows Post Office the words "known as part of a tract of land called Crotch Hall," and later that it described the land as the same land willed to Alfred Ball by his father, Henry Jackson Ball, less about six acres sold off; that the title search sentence was changed to read: "Proper deed or deeds of conveyance and abstracts of title of the said land based upon title searches thereof is to be made by J. K. Roberts, attorney of Upper Marlboro, Md., showing clear and unincumbered fee-simple title in the said land above mentioned and described, in the said Alfred W. Ball"—costs not to exceed $50, to be borne equally by the parties, and the sentence as to non-payment was made to read: "In case the remainder of the first half of the purchase price be not paid on the 7th day of November, then the said $500 so paid to the said Griffith is to be forfeited and the contract of sale and conveyance to be null and void and of no effect; otherwise remain and be in full force."

Dr. Griffith testified he had told Leapley (p. 45) first and later Stewart he had not yet obtained a power of attorney and by agreement with Stewart he arranged to get one and see Ball. He had Roberts draw the power of attorney and then drove with the justice of the peace to Ball's and procured Ball's signature, meeting Stewart in Ball's yard as witness came out of Ball's house, telling Stewart he had the power of attorney and there agreeing on terms of sale. At his house before going to Ball's Dr. Stewart had said to him he believed the tract contained about 240 acres, and witness had replied he thought

the assessment books showed about that, but Ball had told him there was nearer 275 acres. Stewart had responded that would be settled then by a survey and witness had agreed to that. Dr. Stewart had said he wanted the whole tract and Ball likewise was not willing to sell only part. Stewart had talked with witness as to whether he could get an option (p. 49) and witness had objected and declined. Ball (p. 55) had positively refused to give him authority to give an option and he had never given any. When he read in the contract drawn by Thomas about the contract becoming null and void (p. 49) he had asked what was meant by that and Thomas told him it was a protection to witness. Witness inquired why and Thomas replied because if witness had another offer and Dr. Stewart refused to comply "that I could have an option and I could force him or I could make him forfeit the $500." Witness thereupon said all right and signed. Roberts later came in and witnessed the paper. It had been agreed each side should pay half the taxes for the year as witness had told Stewart it was his place, he had bought it, and Ball could not cut wood or crops off it. There was a positive understanding (p. 55) of all parties it was a *bona fide* sale and no option; that Ball had given him no authority to give an option. It had been agreed between them Mr. Latimer should make the survey (p. 57).

Joseph K. Roberts testified (p. 60) he had done as much title examination work as any man in Prince George County and had been engaged by Griffith and Stewart, first through Thomas, to look up the Ball title. Prior to that Stewart and Leapley had told him they were trying to negotiate for the Ball property with Griffith. He was not present when Thomas drew the agreement of sale, but was called in by Dr. Griffith and went over it with

Griffith and Thomas, said it was all right and witnessed it. It was understood there was to be a further agreement along the same lines drawn by witness. He had previously drawn a power of attorney for Griffith with reference to the Ball property, but did not recollect drawing more than the one offered in evidence. He had charge of the matter in a way for both Griffith and Stewart. Nothing was ever said to him about an option or forfeiture.

J. Alfred Ridgeley testified (p. 70) that he had gone to Ball's house with Griffith about the first of June and there were two powers of attorney executed on that day before him from Ball to Griffith. In answer to the attorney for Stewart he testified (p. 71) that he had certified to two powers of attorney on one day before the death of one of the Balls and after the death of one of them toward the latter part of the same month or thereabouts to another power of attorney. In response to a call made by the defense there was put in evidence (p. 73) the power of attorney executed by Alfred Ball for the land in controversy on June 4, which included Griffith's commission, this power of attorney being recorded in the office of the County Register of Wills; also a power of attorney executed June 27 with relation to other land than that in controversy acquired by Alfred Ball meanwhile through the death of his brother, James T. Ball, and a certified copy of the contract of sale or deed with a power of attorney attached recorded by Stewart in the County Clerk's office (Rec. 328). Objection was made by appellant to this last power of attorney as a mere copy certified to by appellee as appeared from the signature and last certificate of J. Alfred Ridgeley, J. P. Thereupon Griffith's counsel called on Stewart to produce the check

Stewart had given the County Clerk for recording for him (Stewart) the paper objected to and the power of attorney given to Thomas.

For the defense George R. Leapley testified (p. 88) that Stewart tried to lease the Ball property, but Griffith said the Balls wanted to sell. Stewart then talked of an option and Griffith replied he could not say until he saw them. Stewart asked if Griffith had a power of attorney. Griffith said no, and Stewart said that must be gotten the first thing, and Griffith agreed to get it and meet Stewart at Centerville about 4 in the afternoon. He and Stewart drove to Centerville and thence to Ball's house, where they found Griffith and Magistrate Ridgeley. Griffith and Stewart went apart and talked. In the talk before going to Ball's house the price was named as $10,000 for 240 acres, but Stewart wanted to pay $250 cash and they settled on $500. He remembered nothing as to the place being said to contain 275 acres; all he heard was 240 acres and the survey was (p. 90) to be made to establish the lines. Witness testified (p. 202) he did not think the price or the time was settled on before they went to Ball's house, nor (p. 104) had they effected a binding agreement because that was why Stewart went to Ball's house. He thought Griffith had said the best offer he could make Stewart was $500 down and the balance of one-half of the purchase money in five months.

A. W. Thomas testified that Stewart had reported to the oil company he could get an option on the land for $500, and witness went to Marlboro to execute that understanding (p. 108). Over appellee's objection minutes in the form of loose leaves of meetings of the oil company were introduced stating an option had been bought. He told Griffith (p. 111) he came to carry out

the agreement made with Stewart and the terms were stated. Griffith said a survey would be necessary to set out the burial lot and because a small tract had been sold off they agreed each should pay half the costs and that Latimer should make the survey. Griffith said the title was good. It was agreed Roberts should make an abstract, but witness stated he, of course, should pass on the sufficiency of the title. He had demurred over expenses for the title and for taxes, but finally agreed. He drew the contract while Griffith went out to find Latimer and Roberts. Latimer came in and they made arrangements. Witness had not said Stewart could be forced to take the property (p. 112). "I simply said that meant that if the money was not paid on the 7th of November as the contract called for the $500 would be forfeited." After the contract was drawn Roberts was found and said it was satisfactory. In the early part of the interview he had asked Griffith if he had power of attorney, and Griffith said he had, but not there. He thought Griffith said the notary had it but he would send it or a certified copy in the morning. Roberts suggested it would be better if he typewrote the contract in duplicate and have Griffith and Stewart execute it, and it was arranged he also should bring the power of attorney. Roberts was not to draw the contract along the lines of witness' contract but simply to typewrite it, and in fact he made no changes whatever. (Note: The two papers show changes were made.)

Griffith was mistaken in saying he gave witness a power of attorney. He had said to Griffith (p. 114) the $500 would be forfeited and the whole thing was a gamble (see p. 112). Roberts the next day came to the office of the oil company, where witness was, with the

typewritten copies executed by Griffith, and there had been added an acknowledgment before a notary. Witness and he compared the copies. Roberts showed him the power of attorney (p. 115). It was the power now on file in the Orphans' Court. Witness remarked he now understood why Griffith did not show him the power of attorney yesterday; he is to get $5 an acre commission. Roberts laughed and witness said business is business. Dr. Stewart came in hurriedly, asked if there was a power of attorney, but did not read it and then signed. To the best of his recollection he never had seen the short power of attorney on the back of the contract and recorded with it in the county clerk's office until the case came on for hearing (see p. 326). He had not said to Griffith the forfeiture clause was a protection to him. Griffith had asked about it.

On cross-examination (p. 125) witness said they were particularly anxious to get the Ball land. The conversation as to the power of attorney occurred at the beginning (p. 129). Dr. Stewart did not know one had been obtained was why witness asked. The whole matter was hurriedly done. He claimed it was stated in the contract he was to pass on sufficiency of the title; at least it was not stated Roberts was. The contract was then read from (p. 130). Witness said it was evident. Roberts had inserted his (Roberts) name there. When witness' manuscript contract was drawn he had not seen Roberts, but they assumed he would examine the title. The company's only option was the Ball option; all other lands were held outright or by lease. Roberts had been employed to search and pass on the titles of the land turned by individuals into the company. The agreement recorded at Marlboro, after being signed by Stewart, had

been handed to witness and then put in Stewart's private safe for accommodation of the company. He had asked Stewart to have it recorded. He never had seen the power of attorney (p. 136) attached to the recorded contract of sale and which power of attorney gave no authority to grant an option, and it was a mystery to him how it happened that the paper recorded by the company had the typewritten power of attorney attached to it. He could not say Stewart did not receive it with the signed agreement, nor could he explain how it happened to differ from the one he claimed Roberts showed him June 6. He was the lawyer for the company, but took Griffith's word for it he had a power of attorney, and did not know its terms when he signed the agreement and paid over the $500. Asked if "I meant what I said. That is all" was the whole of his reply to Griffith's inquiry as to the $500 clause, witness said that was not his answer, and then went on regarding an old matter. See p. 139 et seq. for balance of cross-examination as to the option and Roberts' employment.

Defendant Wm. W. Stewart testified (p. 150) that he was a practicing lawyer and formerly a dentist. The oil company and likewise himself had offices in his building. Griffifth refusing to lease, he had asked if they couldn't get an option, paying $250 down and six months' time. Griffith had said they might for three months if they paid $500 down. Witness' main object was to get time. Witness asked if Griffith had a power of attorney. The latter said no, and witness replied it was very important he should get one. Griffith agreed to do so that afternoon and meet witness. Witness said he understood there were 240 acres, and Griffith replied about that, but three or four acres had been sold off, and a burial

lot was wanted reserved, which would necessitate a survey. There was no mention of 275 acres. The price was fixed at $10,000. He never met the surveyor, Latimer, at Griffith's house. Leapley and he drove to Meadows, and not finding Griffith there at 4 o'clock, drove over to Ball's. A man named Ridgeley was outside the house, and in a short time Griffith came out, and he and witness drew off to one side. Griffith said the Balls would not take less than $500 down and make the time (p. 152) five months for the second payment. Witness replied he would have to bring the matter before the board of directors, as they had not authorized payment of $500, and he could extend the time to November 7 for the option. Griffith said the latter would be satisfactory, and it was agreed the $500 would be sent down by Monday if the board agreed. Griffith said he had a power of attorney, but did not show it. He warned Griffith not to let any one know we were taking an option or others would not lease. The title was discussed, and it was agreed Roberts was a careful lawyer, but witness said the title must be satisfactory to the company, and Griffith agreed. This was Thursday (Note: Thursday, 1903, fell on June 4). He drove to Washington, called an executive committee meeting the next morning, and they finally agreed to take the option. June 6 he was called (p. 155) to the company's office. Thomas gave him the typewritten contract to sign. Witness glanced over it hurriedly. Thomas told him it had been compared and was exactly the same as the one he had signed. "I looked at the option part of it and saw that it was there, and it seemed all right to me." He then signed, left it with Thomas and later placed it in his safe among other oil company papers. He sent to Marlboro for record this typewritten contract he had signed. Thomas said

the power of attorney was there, but witness' recollection was he did not see it. He had not the slightest recollection whether it was a separate paper or joined to the typewritten paper he signed. He could not say whether the power of attorney was attached when he sent the contract for record or not. He had said nothing (p 168) to Griffith about the taxes. His only communication with Griffith on that subject was in letters produced. He called Thomas' attention to them, and the latter said at it was only a trifling amount and as they didn't know whether they would take the property or not, witness better pay them by his check, and the company would pay him. The price was changed from $10,000 to $40 an acre, because at the Ball house the number of acres was discussed and as there was a reservation of a burial lot and three or four acres had been sold off, they could not arrive at any figure, and Griffith suggested $40 an acre, which he accepted. He never had seen Latimer prior to Latimer's testifying.

On cross-examination witness said he was tall and slender, and Thomas short and chunky (p. 170). There was nothing considered in his talk with Griffith except an option—no talk of a sale (p. 177). Witness had said he was sorry Griffith could not get a six months' option instead of five, and Griffith's reply was it was because the Balls usually arranged to cut their wood November first. His check may have been given to Thomas as early as 8 o'clock the next morning, because Thomas was urgent to have the deal go through. He was not so glad to make the deal as the others. He had not used the word option (p. 180) in his letter because that was "agreed upon and it is in the contract." It was not his purpose to have a contract so drawn Griffith might think

it a sale and he could claim it was an option. He considered it important Griffith get a power of attorney, but believed Griffith would not exceed the powers it gave him. He was in a hurry the day he signed and had depended on Thomas, as to the power, the option clause seeming perfectly clear, and he had no real interest. He did not believe he had seen the power of attorney attached to the contract (Note: Neither of the powers of attorney gave Griffith authority to grant an option but authority to sell outright on time payments). The reason the price was changed from $10,000 to $40 an acre was because some had been sold off. Witness also might have said $10,000 was excessive. That was not the main reason. The main issue was to get time. He learned of Griffith's compensation from Thomas the day he signed but did not learn what fools they were in paying $500 on the contract until they later investigated the power of attorney. Roberts' report on the title had been accepted by him as to witness' other properties. He did not know in the agreement he signed (p. 185) there was the sentence as to Roberts' searching the title. Asked if he knew as to the survey provision, witness replied he knew the number was to be 240 acres. It was correct he gave little heed to the matter, and the reason was because he relied on the company's attorney. He sent the contract of sale or deed to be recorded, but how it was that when recorded the power of attorney was part of it was a mystery that could be explained better by appellee than himself. When returned to him the power was attached and all of it had been recorded. When sent for record there was no reason to believe any controversy would arise. He had mailed the paper recorded to the county clerk and had no knowledge (p. 187) Griffith knew of his mailing

it. He positively denied (p. 191) Ball claimed there was 275 acres, and that a survey should settle it, or that it was agreed there was a sale.

The company had no other option in the county than that of Ball. Witness had held an option on the Hinchman farm, but forfeited it. Complainant put the Hinchman option in evidence (p. 326). By it for $100 it was agreed Stewart "shall have a negotiable option of purchase upon said property for $3,200."

Frederick Briggs (p. 206) and Rene Baughman (p. 219) testified, over objection, it was reported to the oil company an option had been bought. Motion was made to strike out all Briggs' testimony on ground he had read over the evidence shortly before testifying.

George K. Flynn (p. 212), Elisha Ferguson, and James Branson (p. 218) testified over objection Ball had said the deal would be off if balance not paid by November 7. The reputation for veracity of these witnesses was impeached (p. 227 et seq.).

Dr. Griffith (p. 233) testified the justice of the peace Ridgeley never had the power of attorney in his possession, and Roberts could not have shown Thomas the power of attorney including his commission because it had remained in witness' safe since acknowledgment until filed in the Orphans' Court after Ball's death. Witness did not know the typewritten agreement and power of attorney delivered to Stewart was recorded until after it was taken away. Ball (p. 237) had told him under no circumstances to give an option. He and Stewart had agreed as to the taxes, Stewart may have remarked $40 an acre on 240 acres was nearly $10,000, but the agreement was on $40 an acre based on the survey. Latimer had been at his office dozens of times, but witness had not seen him there with Dr. Stewart (p. 240).

Joseph K. Roberts in rebuttal testified he had not brought the power of attorney with the commission in it to Washington June 6. He never had that power of attorney before Ball's death because Griffith held on to it. His conversation with Thomas (p. 241) when Griffith's commission came up, occurred after Ball's death and after the Orphans' Court had passed its order. Witness thought the agreement called for him and not Thomas to pass on the title. The typewritten agreement he and Thomas agreed embodied the agreement reached. It with the power of attorney attached, the Marlboro land records showed, were regularly and consecutively recorded. He had typewritten (p. 245) the certificate made by Griffith and Ridgeley and gave Stewart or Thomas the whole paper June 6.

Griffith sent Stewart's $500 check to his bank at Laurel, Md., and after learning it had been honored, took $400 (p. 55) and the contract signed to Ball, who, Griffith testified upon the assurance of Thomas that it was an out and out sale, signed a receipt ratifying the sale. This written paper, dated June 19, was put in evidence (p. 80.) The bill had alleged simply a ratification, and Justice Anderson found an oral ratification sufficient (p. 37). Up to his death Ball stood ready to make any proper deed and to complete the agreement (p. 56). The defense (appellant) calling for the same, a statement was procured from the cashier of the Laurel Bank, and by agreement put in evidence (p. 199) stating Griffith had deposited Stewart's check for $500 June 6, and June 18 had written directing if honored to place $300 to credit of Alfred W. Ball, where it remained until Dec. 5, 1903, when transferred to Griffith as executor. Griffith testified (p. 59) Ball told him to deposit $300, and he gave Ball

$100 per request. On rehearing this matter was gone into at length. See pages 279, 305-6.

Roberts, June 11, 1903, reported the title as good in A. W. Ball (p. 314) and gave his abstract of title to A. W. Thomas (p. 116), who notified Stewart thereof (p. 194). It remained thereafter with either Thomas or Stewart. No objection of any sort was made to the title prior to the death of Ball, which occurred about midnight November 5 or one o'clock A. M. November 6.

Griffith called on Stewart a number of times in the interval regarding the matter and wrote him also. He made no memorandums of his interviews before or after death and could not carry the times in his head (p. 57). At Ball's request (pp. 54 and 55) he called on Stewart about October 15 regarding the survey, Griffith testified Stewart then asked him to delay the survey till after November 7, and he reluctantly consented, and after consultation with Ball agreed to wait, Stewart then for the first time saying he had agreed to let the oil company have the land. Two days before Ball's death he received a letter from Stewart saying he would like to see him before November 7. Letters from Griffith to Stewart in September and early November were introduced (pp. 156, 158). Stewart testified Griffith made several short pop calls between June and October. He was in Maine after October 10 until November 1 (p. 157). He denied asking Griffith not to agitate the matter and survey or that he ever waived a survey before November 7 (p. 161). Griffith had asked him what the company would do at expiration of the option. He replied he did not know, it depended on the company's prospects. On one pop call (p. 170) Griffith had suggested the oil company sell stock and buy the place, but witness refused to suggest it to the

company. Dr. Griffith in rebuttal (p. 237) denied Stewart's testimony as to their "pop call" conversations was true.

After Ball's death Griffith saw Stewart soon after the funeral (p. 54). Stewart fixes the date as November 9 (p. 161). Their evidence differs as to who first said Ball was dead. Griffith testifies that Stewart said that would alter their arrangements a little, and he replied nothing further could be done until the matter was entered in the Orphans' Court. Soon afterwards he again saw Stewart, and the latter then told him he had bought for the oil company, to which witness replied (p. 56) he knew no such thing and would look to Stewart. Stewart told him to go ahead and sell the property if they didn't meet their obligations and forfeit the $500, witness replying he knew nothing of an oil company. Stewart testified (p. 161) he asked Griffith if he had a deed, and Griffith replied no, but he was executor. He suggested the death complicated matters, but Griffith differing with him witness said he had no interest in it but would present the matter to the oil company. Witness advised a forfeiture and Griffith replied he would like us to have the property, and after a desultory conversation left. He denied Griffith at that time said he would look to witness exclusively. The conversation was short, witness having a patient. He next received a letter dated November 10 (p. 162) from Griffith, saying he had consulted two lawyers, and to let him know positively by the 16th what he proposed to do, as he had a proposition from other sources and power under the will to act, and if satisfactory arrangements were not made by noon of the 16th to consider the matter ended. Nothing was done and he thereafter considered the matter finally ended, and as

the oil company did not put up any money witness was much elated it was settled. Griffith in rebuttal (p. 237) testified that at the time this letter was written he had not qualified as executor. He had written the letter because while at the time he had no authority to act he wanted something definite to bring before the Orphans' Court when the will was admitted to probate. He did not know Stewart was worth any property on which he could recover the price of the land, and had another offer the very day he wrote Stewart. The matter was mentioned by him to Attorney Roberts before the court assembled, and Mr. Roberts said nobody had any right to violate the contract, that it was in the hands of the court. The lawyer, J. K. Roberts, told him he would only bring on a lawsuit if he disposed of the property except to Dr. Stewart under the contract. The matter was then put into the hands of the Orphans' Court.

Alfred Ball's will was probated November 17. By it he gave Dr. Griffith, as executor (p. 13), "full and complete power and authority over my entire estate, real, personal and mixed," with authority to sell "my real estate of which I may die seized and possessed at the time of my death" by public auction on such terms and conditions as the executor should think proper. Two thousand dollars was bequeathed to the Methodist Church in trust to be paid out of his personal estate, together with funeral expenses and cost of a monument, but if the personal estate be insufficient, out of his real estate. The proceeds of his estate, after the specific bequests, were to be divided among his direct kin. The will was dated July 10, Ball's brother. James (p. 305) had died, leaving him (p. 48) a farm.

After Griffith qualified as executor the Orphans Court

of Prince George County on December 15, on petition filed by the executor, passed an order (p. 15) authorizing the executor to carry out the contract made by Griffith in his lifetime and to execute a deed conveying a good fee simple title to the land in controversy.

Griffith had two interviews or more with Stewart in November. He had never declared the contract ended in these interviews, but had said his power as agent of Ball ceased at Ball's death (p. 59), but the court could take it up where it was left off. He never had acquiesced and had no authority to acquiesce in a refusal on the part of Stewart to carry out the contract. He had Mr. Latimer make a survey and this survey was offered in evidence. Surveyor Wm. J. Latimer testified (p. 76) that he was engaged by Dr. Stewart and Dr. Griffith to make the survey, but was not notified to begin until the middle of November. He began field work about November 15, but fell on the field and had to be carried home November 20. His son, under his instructions and supervisions, completed the field work. He had about fifty years' experience in surveying in Prince George County and was intimately acquainted with the Ball tract and surrounding lands. He had found the old Ball boundary stones, etc. He identified the original survey map or plat and said it had been made by his sons under his directions; he knew it to be correct and signed it, individually, about the middle of December. It showed 288⅔ acres in the tract. The son, R. E. Latimer, also testified (p. 80).

On November 23, A. W. Thomas sent a letter to Attorney Roberts (p. 117) stating he had examined the proceedings at Marlboro, and the will; that he did not believe a good title could be procured through the court, and that other steps were necessary to furnish a perfect

title. He then said the aggreement should stand pending perfection of title, and that he had so notified *Maryland Oil & Development Company*, the real party. On the same day, Stewart wrote Griffith to the same effect (p. 164), the letters evidently being a joint production, and was promptly advised by letter by Griffith that he knew Stewart alone in the matter and would look to him alone. Stewart testified he had no part in procurement of the Orphans' Court order (p. 165). He had notified Thomas he would write Griffith. Witness denied (p. 188) the two letters were joint productions. He supposed their close resemblance was from their conversation on the subject.

Early in December Griffith called on Stewart to carry out the contract he had made. The result was neither a refusal nor an agreement on the part of Stewart to carry out his contract. The boring for oil had continued all summer and autumn and was in progress the early part of 1904 (pp. 58 and 174). During this time there was a change in the drilling system (p. 165) and Stewart frequently at this time was confident oil would be struck.

If oil were struck the purchasers were ready to pay any price (p. 165), and Stewart, who owned three farms across the road from the Ball farm and further from the oil well, which he had bought before there was any known oil excitement, it being all under cover at that time (p. 172), expected enhancement in values all through the section. He testified: "I hoped there would be oil found on the oil tract proper and I invested more money than I ought to have on that prospect (p. 173). One day I was up in the air and the next day down in the depths of despair." This state of mind continued through the autumn and the month of December.

Wm. E. Ambrose, lawyer, testified that some time after November 23 he called at the office of Dr. Stewart with Dr. Griffith. Stewart invited them to the office of his attorney, Mr. Thomas. Witness stated he had come to offer a deed to the Ball tract concerning which Stewart had entered into an agreement with Griffith. Thomas interrupted that they could not give a good title and this was discussed pro and con. Thomas, as attorney for Stewart, raised numerous objections. Ambrose testified, and particularly to the authority of the court to authorize the executor to convey. Witness explained the statute, but was unable to satisfy Thomas, although Stewart was more amenable to reason. No objection was offered to the abstract, but to the title. Witness offered to leave the matter to any title examiner, but nothing definite was determined except that Roberts so far had been satisfactory. Finally, Griffith, Stewart and himself went out into the hallway (some gentlemen coming in) and there it was agreed Roberts was to continue the title work, cure such defects as could be cured, and his ultimate opinion would be satisfactory to Stewart. Before going into the hallway, Thomas promised in a day or two to give witness a statement of his objections, to be submitted to Roberts to pass on any claimed defects. Stewart wanted Roberts to continue the work and cure defects, if any necessitated action. No claim that there had been a forfeiture was made. Witness asked Stewart if he desired to carry out the contract if a good title could be had and Stewart stated most emphatically he had no end in view but perfecting title and the taking to himself of the land; that he had arranged to buy it and would be disappointed if he did not get it. He had then asked Stewart if he wished to drop the matter and let the $500 he had paid

go. Stewart said he did not and that he wanted the land. He (p. 80) had said to Stewart if he claimed the right to suffer a forfeiture witness wanted to know it. The delay occasioned by Ball's death and any defects his attorney considered existed Stewart said would not be taken advantage of by him. Griffith and Stewart agreed to abide the survey, but the fact of a larger quantity than the contract specified was discussed. He went to Thomas' office several times, but Thomas said he had been too busy with oil matters. A week or ten days later Thomas handed him a letter setting forth his objections. Witness promised immediate attention and asked again if a good title could be had would he take the land, meaning Stewart, and Thomas so understanding. Thomas replied he would, that only the title bothered them, and so soon as Roberts satisfied him the title was good Stewart would complete the purchase. One objection was a possibility certain persons interested in dower might be living, and affidavits were to be had showing their death. (See affidavits death Elinor Ball, p. 29.) Dr. Griffith unqualifiedly tendered himself ready to carry out the contract and there was an acceptance of that tender with no reservations as to any other question than the title.

Witness laid out his course of action (p. 75) at Stewart's office with Mr. Merillat before going over there. He later turned over all papers to Mr. Merillat, whom he took into the case. He had gone to Stewart to ascertain his position, but had then no authority to sue nor reason to believe suit would be necessary. Dr. Stewart contracted with Dr. Griffith to do a certain thing, but when he went there he found Stewart and his attorney raising technical objections to a record title that necessarily involved delays.

Dr. Griffith testified (p. 57) that after he got from the Orphans Court power to transfer the property to Dr. Stewart after having submitted the contract of sale and after he had a deed and mortgage ready he went with his lawyer, Mr. Ambrose, to see Dr. Stewart, and informed the latter he was ready for compliance with the contract. Stewart, in the presence of his attorney, Thomas, said he was ready to comply with the terms of the contract, but he did not consider the title then complete. Mr. Ambrose had asked him if he would comply when the title was satisfactory and complete, and Stewart had replied that he would. Stewart stated that Mr. Thomas thought there was a link missing between the time of completion of Roberts' abstract and the then present date, and witness agreed to make that good. Boring for oil and purchasing of property was going on until some time in the winter—November and December.

The abstract originally made by Mr. Roberts in June, 1903 (R. 314), that later made by him under date of December 15, 1904 (R. 17), and a later continuation to February 9, 1904, all showing a good title in Ball and later in Griffith, are in the record after having been duly proved, as are certain affidavits (R. 29) procured to meet certain suggestions made by appellant. Also a letter from appellant's attorney, A. W. Thomas (R. 320), dated December 17, 1903, raising certain objections to the title.

Dr. Griffith further testified (p. 58) that when he and Ambrose first saw Stewart they merely said they wanted the missing link supplied to bring the title to date, and Stewart said he would be willing to accept the property if the title was made complete, and they agreed Roberts should look into the matter, and Roberts had done so at witness' request. He had never acquiesced in a refusal

on Stewart's part to carry out and perform the contract; never did such a thing and never had authority to do such a thing. When Stewart had told him the title was not good he had told Stewart he was worth as much property as was involved and would give a warranty deed or guarantee to the title and make himself responsible for it. Shortly before suit was brought he had called on Stewart with Ambrose and Merillat, and Stewart became angry, declined to carry out the agreement and sent for his lawyer.

Jos. K. Roberts, an attorney of Marlboro, Md., testified (p. 61), that after the death of Ball he, at the request of Griffith, had gone to see what Stewart was going to do in the purchase of the property. Thomas did most of the talking. Stewart was present. Thomas said the title was not satisfactory because Ball had died and the heirs would have to sign, and he could not get a good deed. Witness tried to explain how, under the Maryland practice, the administrator could be authorized to execute that deed, but this did not suit Thomas, who said the court had no authority in the matter and the heirs would have to join in the deed. He had told them the heirs were so badly scattered they (heirs) could never be gotten, whereupon counsel for appellant, Mr. Edward H. Thomas (not A. W. Thomas), put on record (p. 62) an objection to the suit because the heirs were not parties. Nothing was said about the oil company or about an option or a right of forfeiture. Witness had charge of the matter in a way for both parties and used to go to see Stewart about it often. Witness put the matter in the hands of Mr. Ambrose. He had prepared two abstracts, one to meet objections by Mr. Thomas. He had received no objections to his abstract of June 11 until after Ball's death.

A. W. Thomas testified the Ambrose interview occurred December 8 (p. 118). He was given an Orphans' Court order and a deed from Griffith, executor. Dr. Stewart said it was the oil company's matter. Ambrose said he did not care. Witness said it was the oil company's matter and he represented the company. Stewart said witness did not represent him and it was the oil company's matter. The survey was not handed him, but Griffith stated that there was 284 or 288 acres instead of 240. He was present during all the conversation and denied Ambrose's testimony. Stewart said he wanted the land or was satisfied with Roberts' work. Most of the conversation was between himself and Ambrose. Witness said the abstract was not down to date and was not satisfactory for several reasons and he would state them later, which he did December 21 in letter dated December 17. (See p. 319.) Witness denied it was true (p. 121) as testified by Ambrose that some gentlemen came in and he and Griffith and Stewart went into the hall. They were to hold a meeting that day, and Griffith and Ambrose went away, leaving Stewart in the office, to his best recollection. Dr. Stewart remained inside and the meeting was held then and there and he had entered it in the company's book. Examining the book, witness said he found he was incorrect, that he sent out the notices for a meeting that day. He denied Ambrose's testimony in detail. He had insisted the Orphans' Court was without jurisdiction. Ambrose also was incorrect as to witness' statements to Ambrose ten days later.

On cross-examination witness said they, in November, were boring for oil and were generally hopeful of striking oil, but sometimes broken-hearted. He did not think his personal feelings as to whether in December he was

ready to relinquish all right to the land had any bearing on the contract. He asserted that in the interview with Ambrose and Griffith he represented the company of which he was secretary. His position (p. 133) was that by Ball's death a good title could not be given then and that to make title was Griffith's first step. He had objected that the abstract sent him only ran down to June 11th and he had said the first step was to make that good. He had raised a number of objections. He had had the abstract (p. 144) from June until after Ball's death and never had until after November 7th raised any objections to the title, but could not say as to Stewart. Roberts had called his attention to the abstract. Witness when asked (p. 146) if he had said to Griffith the contract would be carried out if title were perfected, said he did not, but said it would stand, meaning, he added, of course the contract with the oil company. What was to happen if the title was perfected he had not said. He guessed neither party got any clear idea of what would be done. He was cross-examined at length (pp. 146-149) as to whether he was endeavoring to gain time and be free to claim rights or not, as the oil drilling might turn out, but said intentions were vague things and nothing definite had been said by him and nothing agreed to on December 8. The matter did not rest on his *ipse dixit;* the courts were open to them. He could not be sure of all Ambrose had said and whether he had said anything about the oil company being a matter between the company and Stewart that did not concern Ambrose. He was only secretary and could not bind the company and did not assume to. The office of the company and his law office were in the same room. He was not prepared to speak as to whether his purpose was to keep foot loose but to keep Griffith tied.

Dr. Stewart testified (p. 166) that on December 8 Griffith and Ambrose called on him and he showed them to the office of the Maryland Oil & Development Company, where one of them handed him a paper, which he immediately passed over to Thomas, telling them he had nothing whatever to do with the matter and that it concerned the oil company. Thomas told them certainly it was the company's matter and witness was only the nominal party. Ambrose said he did not care, and there was a title discussion, Thomas saying it was insufficient. Ambrose said there was 288 acres in the tract, which was the first he ever heard about there being over 240 acres. "I had no conversation at all. I did not say another word after that with Griffith or Ambrose. I was too mad to express what I felt. I did not join in this discussion about the title." He denied Ambrose's testimony was correct. He did not go out in the hallway. There was no such conversation as testified to by Ambrose. There was no conversation wherein Griffith had agreed (p. 168) to make himself personally responsible for the title.

On cross-examination witness denied (p. 192) that he continued any negotiations after November 16. He had disclaimed responsibility. After July the executive committee of the oil company had charge of the matter. He ceased to be president, but continued as vice-president. When he got the letters from Griffith in September he did not refer him to the oil company, "because we were in the midst of our drilling. Things were looking pretty fair and we did not want it known and did not give it much concern. The agreement was entered into and was recorded and that is all there was to it." In November and early December he positively did not care personally whether they held on to it for a while or not. The exec-

utive committee stood "pat" on the matter, as title had not been given or a deed presented on the date. No demand was made for the $500. No objection to the title was made prior to December, but that was with Mr. Thomas, the company's attorney. Asked if in October (p. 200) he had requested Griffith to delay the survey, witness said he did not remember any such conversation. He denied taking any part whatever in the conversation of December 8, it was held with Thomas.

Rene Baughman testified (p. 200) that he was present in the fall or early winter of 1903 in the oil company's office when Griffith and his attorney called. Briggs and Lucas and himself entered the office together. The others already were in the office. His business was in reference to Lucas tendering his resignation as president. Dr. Stewart did not go out in the hall and had no conversation while witness was there with the gentleman. The meeting was in force, Dr. Stewart was president or chairman of the executive committee and could not leave. He did not vacate the chair.

On cross-examination, witness said the room was about 10 by 12. Stewart was 10 or 12 feet from the door. Griffith and his attorney were about five feet from the door; they were not in the act of leaving, but remained standing two or three minutes after witness, Briggs and Lucas entered. Their entry did not interrupt the conversation. Stewart was not participating in the conversation. He was certain Stewart did not see the gentlemen to the door, because the meeting was called at once. What attracted his attention was because the conversation was about title to the property. The only thing he remembered being said was about getting the heir to sign the deed. As soon as the gentlemen moved out they called

the meeting to act on Lucas' resignation, and they certainly would not let Stewart go out. (Note: Thomas testified the company's records show the meeting was not held that day but the next day.)

In rebuttal Griffith (p. 238) denied Stewart at the interview told him and Ambrose he had nothing to do with the matter and that when he handed Stewart a paper he turned it over to Thomas for the Maryland Oil & Development Co.

J. K. Roberts testified (p. 245) that after Ball's death he informed Griffith he would have to submit the matter of the Stewart agreement to the Orphans' Court and act under its orders. It seemed some one else was after the property and Griffith asked witness what he could do and he told him.

Wm. E. Ambrose questioned (p. 247) as to Stewart's testimony that he (Stewart) when Griffith and Ambrose called had immediately handed the paper over to Thomas stating that he (Stewart) had not anything to do with it, that it was entirely the oil company's matter and that thereafter he (Stewart) had nothing to do with it, replied: "I have no recollection of any such statement." As a matter of fact, Stewart did have negotiations with him after the first moment of witness' call.

There was put in evidence a further title report (p. 24) by Roberts, dated December 15, 1903, certifying to the title as good and that a deed from the Orphans' Court under its orders of November 17, 1903, and December 15, 1903, would convey a good title to Stewart and also a continuation (p. 29) down to February 9, 1904.

Evidence was offered of a further tender to Stewart of a deed, mortgage and title just before suit was brought and of Stewart's February 15, 1904, refusal.

By Attorney Roberts (p. 63) evidence was offered that Alfred W. Ball had no other property in the county early in June, 1903, than that in controversy; that Ball was in possession and exercised control over the entire property shown by the survey. Witness knew this from its location and surrounding properties.

Columbus Pumphrey (p. 67) testified that he had lived near the Ball tract forty years and knew Alfred Ball's father and Samuel J. Fowler (p. 69); that he had lived near the Ball farm off and on ever since his birth in 1835, and that the Balls had held possession without interference or adverse claim to any part of the land after Henry T. Ball died or since. Henry T. Ball's will probated September 18, 1877, was put in evidence (p. 311).

Over appellee's objection that evidence as to values was incompetent, since no misrepresentation was alleged, considerable testimony was taken as to values. That for appellant claimed the land was not worth over $10 an acre, and Stewart said he would not have bought it at any price personally, and that the oil excitement had no effect on values; while that for appellee placed the value at $20 or $25 an acre, irrespective of the oil excitement, which had consideraby increased values. The evidence as to values will be found at pages 63, 68, 71, 92, 94, 98, 124, 153, 172, 202, 208 and 210.

The justice presiding, after argument, passed a decree in favor of appellee (p. 329). Thereafter appellant filed affidavits alleging experts would testify the long power of attorney and ratification were forged, and claimed they had not received as full a hearing as they were entitled to; whereupon the justice reopened the case and testimony was again taken. At the rehearing, after listening to appellant's statement of their testimony, the justice de-

clined to hear argument on it, saying it was too weak to be seriously considered, but at appellant's insistance said he would listen as to any law points. After argument, he ruled that the heirs were indispensable parties, and personally directed that the word "alone" should be inserted in the decree (p. 369) in favor of appellant, saying it was solely because of his change of views as to heirs he reversed himself and the word "alone" must be inserted to show that, as he was taking a train for his vacation that afternoon and had not time to write an opinion.

The testimony on rehearing appears at pages 255 to 309. It appeared Ball had on file at Marlboro his renunciation of administration on Jim Ball's estate and a bond signed by him. Appellant subpœnaed these papers, but objected to their introduction in evidence. Wm. J. Kinsley testified Ridgeley had not written his signature to the long and short powers of attorney and that the same hand did not write the ratification or the long power of attorney that wrote the will signature of Alfred W. Ball and to the deeds and Jim Ball power of attorney. He had previously known which signatures were disputed and took the others as standards. On cross-examination he said there were no resemblances except the name was the same. He was a professional handwriting expert; it would not alter his opinion if a man said he himself wrote both signatures. He refused to pass on the bond and renunciation signatures. A man who seldom wrote would write more consistently and even than one who wrote often. Ball was a consistent writer.

Edward Schaeffer, a professional handwriting expert, and also a tutor, said the two Ridgeley signatures were not genuine. The long power of attorney he regarded as

a poor imitation of Ball's signature. When employed he knew which were the standards. The long power of attorney and ratification were not genuine if the will was, but the Jim Ball power of attorney and two deeds were. The will signature was of one not used to writing and not having facility in use of the pen. He had examined the papers first March 23. The long power of attorney signature differed so from the standards he early desisted from its study. On cross-examination he said he first examined the papers March 12 and he gave an opinion that day. It was strongly probable the person who wrote the body of the ratification also signed it. There were no common characteristics to all the four Ball signatures. He would not pass on the bond and renunciation signatures. He would place his opinion above a justice of the peace of good repute who had seen the names signed. Good control of the pen was not necessary to uniformity.

Edwin B. Hay, attorney and handwriting expert, testified that in his opinion the signatures to the ratification and long power of attorney were not genuine if the will, the deed and the Jim Ball power of attorney signatures were, and the Ridgeley long power of attorney signature likewise was not genuine. The Jim Ball and will signatures had been submitted to him as genuine and he therefore assumed they were, though there was a marked dissimilarity between them. Cross-examined, he said a variable signature made handwriting evidence less certain and the Ball signatures showed great variability. The same person wrote the bond, the renunciation and Jim Ball power signatures. It was natural to the writer to have differences in his signatures. Age and circumstances all would account for differences.

Philip Happ (p. 270), paying teller in a bank, called

by Stewart, testified the ratification, the will and the deed signatures were by the same person. The long power of attorney signature he would not pass on. Cross-examined by appellant's counsel, he changed his mind. Cross-examined by Griffith's counsel, he said the bond and renunciation signatures were by different persons. All the signatures were of an irregular and variable writer. He had known signatures made on the same day to show considerable differences. The same person signed the bond, the ratification and the long power of attorney.

David N. Carvalho, handwriting expert, testified the Ball signatures to the ratification (p. 272) and long power of attorney were not, in his opinion, by the same person who wrote the will, the deed and the Jim Ball power of attorney signatures. The Ridgeley signature was not by the same person, in his opinion, as wrote the Ridgeley signature to the Jim Ball and short power of attorney. The same person who wrote the Ridgeley signatures to the long power of attorney wrote the disputed Ball signatures.

Cross-examined, witness said he assumed, and from what he had been told by Stewart, that the signatures he had designated as the disputed signatures were questioned. He declined to say whether the same person wrote the body also had signed the ratification, and said he did not want his direct testimony as to a Greek E to be so taken. The conceded signatures were those of a very erratic writer—unusually so; an illiterate, outrageous signature. There were tremendous variations of hand and standards. The bond and renunciation signatures were genuine. His attention being called to it, he said there was a distinguishing peculiar, simple characteristic present in all the Ball signatures in the case—a slight

stop or emphasis at the end of the W. A busy country doctor would not be likely to observe such a small peculiarity; he was testifying only to a matter of opinion. He made no pretensions to infallibility. In the Mayhew deed Alfred W. Ball in the one signature showed wholly different styles.

George W. Waters, cashier of the Laurel National Bank (p. 278), and W. Howard Gibson (p. 280) of the U. S. Treasury, testified for appellee that in their opinion all the Ball signatures were by the same person, and all the Ridgeley signatures were by another person. The latter based his opinion quite largely on the rest of the finish of the W in the Ball signatures, saying none but an expert counterfeiter, and perhaps not such a man, would notice it. Both said they would accept the word of any reputable person who said he had seen Ball sign the disputed papers.

Willey O. Ison, a Treasury clerk, whose duty was partly to examine signatures, testified (p. 283) that the few signatures and their variable character with the many marks of dissimilarity in all the signatures made the formation of a definite opinion difficult, but he would accept the word of any reputable person who could state he had seen Ball sign his name.

John T. Fisher, clerk; C. W. Clagett, lawyer; C. A. M. Wells, lawyer; C. A. Wells, consulting physician and bank president; C. W. Darr, lawyer; Buchanan Beale, deputy United States marshal; Richardson N. Ryan, county treasurer (pp. 285-7); Francis E. McManus, Episcopal clergyman; W. R. Smith, register of wills of Prince George County, testified orally, and Judge Geo. C. Merrick and Father Frank A. Schawallenberge, Catholic priest (p. 308) by deposition to the good reputation of Griffith.

John T. Ball, first cousin to Alfred W. (p. 287); John P. Hawkins, colored, who worked about the place for Alfred; Henry Payne, farmer (p. 289); Geo. W. Waters, bank cashier; Benj. J. W. Swayne, a visitor to Alfred Ball's house (p. 278); Samuel J. Fowler (p. 291), with whom Ball proposed to board when he moved away; Richard Swann, farmer and county commissioner (p. 291), and Geo. W. Richardson, stock dealer, all testified to statements by Alfred Ball or to circumstances showing he had sold his farm to Stewart through Griffith and was planning to leave his home. Allen Bowie, lawyer (p. 293), identified the signature on the bond of Ball, and W. R. Smith, register of wills (pp. 293 and 305), testified to matters concerning the conduct of the Balls' business by Dr. Griffith, complainant's counsel stating the matter was irrelevant, but they were willing to admit testimony.

J. Alfred Ridgeley (p. 295) testified again to the signatures of Ball's that he had acknowledged, and also identified his own signatures. Dr. Griffith identified Ball's signatures (p. 297), and testified to details concerning the signatures by Ball that were in dispute. The ratification and receipt he had obtained on a visit while attending James T. Ball, and there was put in evidence his ledger and contemporaneous physician's book of visits showing he was there on the day named. Alfred Ball had sent him a number of short notes to call by various persons on their way to Marlboro. Joseph K. Roberts (p. 299) testified regarding the recorded power of attorney.

Irving Owens, a bookkeeper, testified (p. 300) he had heard a number of people state Dr. Griffith would stoop to anything and was untruthful and dishonest. He named several persons. On cross-examination it devel-

oped Dr. Gritffith, for what he considered cause, had denied his home to witness, who wanted to visit and later ran off with and married Griffith's niece. T. Van Clagett, attorney (p. 301), testified he had heard a number of people say Griffith was dishonest and tricky. Owens was one of them. On cross-examination, he named persons whom he said he had heard say Griffith was untruthful. Griffith he said was very energetic and aggressive and as leader of the independent democrats had strongly opposed witness' brother-in-law and uncle and the regular democratic organization. One of those he had named, he admitted, was a railroad hand whom Griffith had sued for a fee, and another an enemy of Griffith.

John H. Traband, carriage dealer (p. 303); Augustin T. Brook, deputy treasurer; Richard S. Hill, farmer and physician (pp. 303-4), who had been named by Owens and Van Clagett, denied the statements attributed to them by the witnesses, and said that in politics they were bitterly opposed to and had attacked Griffith, but that his reputation for truth and honesty was excellent, and they never had said anything against him except his political course.

John T. Fisher, Richard N. Ryan, Francis E. McManus, Hampton Magruder, state's attorney (p. 308), and Frederick Sasscer, editor, testified to Ridgeley's good reputation for truth and honesty.

Argument.

In the opinion of the justice presiding the proof in this case established all the allegations of fact necessary to appellee's right to specific performance. That as matter of law joinder of heirs was indispensable was the sole ground of his reversal of his former decree, and he per-

sonally and specially, stating that he was about to leave the city that afternoon on his vacation and had not time to write an opinion, directed insertion of the word "alone" in the final decree to show this. Appellee therefore comes here entitled to have every reasonable presumption of fact in his favor, as "the conclusions of a chancellor depending upon the weighing of conflicting testimony have every reasonable presumption in their favor and are not to be set aside unless there clearly appears to have been error or mistake on his part."

Tilghman v. Proctor, 125 U. S., 136;
Callaghan v. Myers, 128 U. S., 619.

In addition appellee has the added fact in his favor that the Court of Appeals sustained the chancellor in his finding of facts in favor of appellee and reversed him on the ground that as matter of law the heirs were not even proper parties. This court has said it will not, save for gross error, reverse findings of fact made by two lower courts.

Furthermore, appellant has in his favor the fact that the written evidence made at the time when there was no motive or inducement to falsity accords with his testimony and contradicted that adduced by appellee.

"Those who seek to set aside their written contracts by proving loose conversations should be held to make out a clear case. When they charge others with fraud founded on such evidence their own conduct and acts should be consistent with such an hypothesis."

Ogilvie v. Knox. Ins. Co., 22 How., 380;
See also Howland v. Blake, 97 U. S., 624; Snell v. Ins. Co., 98 U. S., 85.

Moreover, in favor of appellee Griffith, where there is a

conflict of testimony, is the fact that Leapley, one of the chief witnesses for appellant Stewart, is shown to have been a man of bad reputation for truth and veracity, that the same was shown to be true of two or more others of the several county ne'erdowells that appellant put on the stand to testify to improbable and disproven circumstantial interviews with the dead; that in important particulars the appellant Stewart is contradicted by his own writings and his own witnesses on matters as to which he could not in reason be mistaken, and that the record shows he and his attorney Thomas were lacking in candor and frankness, were evasive on the witness stand, testified incorrectly as shown by writings in the case with which they were connected, and in their dealings with appellee were dexterously endeavoring to use the English language to trick and deceive to their own profit the appellee, but were not quite so smart and cunning a pair of promoters and not so learned in the law as they deemed themselves to be. They caught themselves in their own trap. Appellant Stewart being proven by his own letters, the testimony of Baughmann, his own witness, and others to have testified falsely as to matters as to which he could not be mistaken his testimony and Thomas' where it disagrees with that of Ambrose and Griffith is not entitled to credence.

In re Santessima Trinidad, 7 Wheaton, 283.

The contract in evidence is clear, fair in all its parts, reasonable, was prepared, save for a few small changes made therein by Roberts, who was attorney for both appellent and appellee, and whose changes were compared by appellant's attorney Thomas with the original before signature by appellant's own special attorney Thomas, as

shown by the letters Stewart sent to Griffith the day the first contract was signed, and is mutual in its obligations.

"If a contract respecting real property is in writing, and is certain, fair in all its parts, for an adequate consideration (at the time of making) and capable of being performed, it is as much a matter of course for a court of equity to decree specific performance of it as it is for a court of law to give damages for a breach of it."

Maryland Clay P. Co. v. Simper, 96 Md., 5;
Cathcart v. Robinson, 5 Pet. (U. S.);
Spoor v. Tilson, 100 Va., 517;
Sloan v. Rose, 101 Va., 154;
Fry on Spec. Perf., 3d Ed., p. 25;
Maughlin v. Perry, 35 Md., 352.

"If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

B. & O. S. W. v. Voigt, 192 U. S., 565.

Specific performance as a remedy of right is expressly provided for by Sec. 199, Art. 16, Code of Maryland, in which State lies the real estate in controversy, and which likewise was the home of the making of the contract.

Appellant defended on two primary grounds: First, that the contract, while taken in his name, was made in behalf of a disclosed principal, the Maryland Oil & Development Company, and second, that it was an option contract. When hard pressed, he raised other objections, namely, the title, the acreage as determined by the

survey, the value, alleged acquiesence in termination of the contract, and lastly when all these were determined against him and the decree was signed, by a baseless calumny against appellee and an allegation of forgery, so poorly supported the justice presiding and who had granted the rehearing, after hearing appellant's evidence, refused to permit argument on it and said appellee needed no hearing in its refutation.

Appellee denies there was any disclosed principal. He asserts the only principal he knew was Stewart, the appellant here. In this he is borne out by the two signed contracts, by the personal check of appellant, by the note of introduction given by appellant to Thomas as his personal attorney, by the subsequent personal check for taxes of appellant, by the several notes appellee addressed personally to appellant, and the failure of appellant to disavow personal responsibility for the contract during the summer and early autumn when as appellant in his testimony admits all was fall weather and the drilling was progressing favorably as appellant hoped. The only documentary evidence contrary to this prior to Ball's death is the bill rendered by Roberts to the oil company after the contract was executed and was complete, for half the title examination fee, but the knowledge of Roberts in the first place would not be the knowledge of Griffith nor be binding on him, inasmuch as Roberts was the attorney for both Griffith and Stewart, and, secondly, the charge of Roberts as made out at the time of his first employment when the sale was made and entered in his account books contemporaneously was against Griffith and Stewart personally, and the testimony of appellant's own witness is that it was *after* the contract had been signed by Griffith that Roberts came to Washington and learned the oil company was connected

with the deal. The authorities are clear that where an agent makes a contract in his own name and afterwards it is learned that he signed for an undisclosed principal the other party may hold either agent or principal. All the record evidence is in harmony with appellee's statement he first learned of any relation of the oil company to the deal with Stewart when in early October he called on Stewart in relation to the survey and Stewart asked him to delay because he had given the oil company the right to take the land off his hands, but he wanted the land personally and his word to the company would be kept if the company did not take the land by November 7. Stewart's attempted explanation of his note of introduction of Thomas to Griffith that it was a hurried production is contradicted by his own witness Baughmann, who testified that the note was a carefully prepared letter which had been carefully discussed after it was written and that it was written to conceal the company's identity. The improbability that parties so eager to conceal the real principal would disclose the same to a busy country doctor whose practice took him into the homes of the people who it was desired to keep in ignorance is but equalled by the naive statement that as Griffith knew verbally Stewart was not the real principal, but the oil company was, that the written note was sent *to Griffith,* in order that the identity of the real principal might not become known to others, or the equally convincing statement of appellant that he informed Griffith orally of the real principal because he always does business that way, saying just what he means and doing just what he agrees, when a short time later he admitted saying to School Trustee Armstrong that he personally and not the oil company had bought the Ball farm, although this was

not the truth, because this would serve his purpose of deceiving the public as to the oil company having bought land. After Ball's death, and when the oil fever had reached a stage where he was up in the air one day with visions of millions and down in the depths of despair the next day, Stewart and Thomas each, on November 23, evidently a day of doubt as to oil, wrote letters avowing it always was the oil company's deal, failure to find oil of course involving failure and bankruptcy of the company as a business enterprise. Stewart attempted to deny these letters were the product of a joint authorship, but they bear internal evidence on comparison of their common compilation by Stewart and Thomas. They met the very next day from Griffith a prompt and emphatic written response as to who was the real principal, and that he looked to Stewart alone. The letters of Stewart and Thomas evidently were penned on a day of despair; they doth protest too much. Later, hope sprang anew, and in December Stewart's emotions made him unwilling to let go or definitely hold on. He said to Griffith and Ambrose he wanted the property and meant to take it, but the title wasn't satisfactory and asked it be brought down to date and then had his attorney obtain delay by various claims without merit as to the title, including requests for affidavits as to parties deceased for more than thirty years. If oil were struck he would, as he says, have been willing to pay any price. To Ambrose he held out hopes personally and said he would carry out the agreement and raised objections to gain time. Whatever the real situation between Stewart and the oil company, the evidence is decidedly weak when it attempts to bring home knowledge to Griffith that the real principal was not the person in whose name ran the contracts, the checks and the letters.

The Sale was Absolute,-Not an Option.

The contract is not an option agreement but an out-and-out sale. The authorities are practically, if not entirely, uniform in holding that the phrase in the agreement that if the balance of the purchase money were not paid by November 7 the $500 down payment should be forfeited and the agreement be null and void, does not import an option contract terminable by default of the vendee, but means that the vendor has the election on defualt to forfeit the down payment or to compel performance of the contract by the vendee.

Wilkerson v. Stitt, 65 Calif., 596;
Dana v. St. P. Ins. Co., 42 Minn., 194;
Dooley v. Watson, 1 Gray (Mass.), 415;
Western Bank v. Kyle, 6 Gill (Md.), 343.
Hooker v. Pynchon, 8 Gray, 552;
Mason v. Caldwell, 5 Gilman (Ill.), 196;
Hull v. Sturtevant, 46 Me., 34;
Cathcart v. Robinson, 5 Pet. (U. S.);
Fry on Spec. Perf., p. 56.

Hazleton v. Le Duc, 10 App. D. C., 379, and Cochran v. Blout, 161 U. S., 350, are in logical accord with the above.

Appellants when the testimony was taken asserted that it was improper to go outside the contract or deed signed to show whether the parties meant it to be an option or not. Now they seek just the reverse but are in equally bad case in either view of the matter. Their weakness is shown when they seek to distort the ratification (as shown on page 43 of their brief) into a release of appellant from liability for survey or attorney's cost when it obviously releases therefrom not appellants but appellee.

The testimony furthermore shows that this construction of the written contract or deed as not an option but an absolute sale is in accord with the understanding conveyed to Griffith by Thomas when the contract was signed. Griffith says Ball refused to make an option contract. It is admitted Stewart asked Griffith to ascertain as to this from the Balls. Griffith says he inquired when he read that part of the contract of Thomas, and Thomas assured him it was a protection to the vendor—just as the law says is its true construction. Thomas admits there was an inquiry made of him on this point, but denies he gave the alleged assurance. His cross-examination, if it tells nothing else, shows clea ly that Thomas on this point skirted the edges of the truth with Griffith and sought, according to Thomas, however, without any definite committal, to have Griffith believe it was not an option but a benefit to Griffith. On this point Thomas and Stewart, half-read lawyers, simply were not so smart as they thought themselves. This testimony was admissible.

Thistle Mills v. Bone, 92 Md., 50.

The evidence amply supports Griffith's testimony as to the oral understanding. The language employed in the Hinchman option (R. 325) shows Stewart knew how to state an agreement was an option when he had a party willing to make him an option. The power of attorney to Griffith moreover gave him no authority to sell an option and the presumption is appellee would exercise and appellant accept only the power given.

Coleman v. Garrigues, 18 Barb. (N. Y.), 60;
Jackson v. Badger, 35 Minn., 62.

Stewart attempts to excuse himself on this point, as

does his attorney Thomas, by saying he did not read the power of attorney and that the agreement or deed was executed and money delivered without ever seeing the power of attorney. They were both lawyers. They knew the necessity for and scope of a power of attorney. Stewart *testifies he specially charged* Griffith that he must secure a power of attorney, and Thomas that Stewart cautioned him he had not yet seen the power of attorney. Yet they both want to be believed as against Griffith when he states he showed to Thomas a power of attorney and gave it to him, this being the short power of attorney which did not include his (Griffith's) commission. Even more, they, the next day, received the typewritten agreement and signed the same, put it away in the safe and later recorded it. Attached to it was a power of attorney, without Griffith's commission, such as Griffith says he gave Thomas. And now Thomas and Stewart, in whose custody the paper was, say, and ask credit be given them, that they never saw the power of attorney and don't know how it got of record, though they sent the paper to which it was attached and which was recorded with the power to the county clerk and paid for its recording. Thomas indeed says Roberts showed him another power of attorney with Griffith's commission the day Stewart signed the agreement, and tells a story as to how they joked about Griffith's commission. But Roberts testifies Thomas has mixed his dates and that this conversation occurred after Ball's death, when he (Roberts) brought up a court order authorizing the executor to complete the contract the decedent made. Griffith states, and Roberts corroborates him, that Griffith retained constantly the long power of attorney in which his commission was stated, that this power of attorney reposed in Griffith's safe from

the day of execution until its filing in the Register of Wills office subsequent to Alfred Ball's death.

Stewart being Griffith's principal, the contract being no option but an outright agreement of sale, and such contracts being enforcible by specific performance, we come to the inquiry whether the suit at bar is maintainable.

The suit is brought by an executor and former agent of the decedent who made the contract. The situs of the land and the contract is in Maryland. The law of that State therefore governs the interprteation and the rights.

Sec. 104, Art. 93, of the Code of Public Laws of Maryland provides: "Executors and administrators shall have full power to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted, except actions of slander."

Sec. 327 of the Code of the District of Columbia is almost identical with the foregoing, and Sec. 329 of said code confers on foreign executors the same rights of suit granted local executors.

Though the action be brought in one jurisdiction, specific performance may be compelled though the land be in another jurisdiction. The reason is that the action is a personal transitory one and equity coerces the individual into paying the price and taking the land. The decree operates upon the person of the defendant.

Worthington v. Lee, 61 Md., 530;
Hart v. Sansom, 110 U. S., 151;
Cloud v. Greasley, 125 Ill., 313;
Epperly v. Ferguson, 118 Iowa, 47.

The title comes from the deed executed:

Grant Coal Co. v. Clary, 59 Md., 441.

The trial court finally decreed in favor of appellant on the ground the heirs were indispensable parties and that the suit was fatally defective. In this it was in error and the Court of Appeals was right in reversing the trial court and ordering the original decree reinstated. The heirs could not as a matter of fact have been joined by appellee for reasons apparent on the face of Alfred Ball's will, and as matter of law they not only are not indispensable, but they are not even proper parties. Executor Griffith also is the proper party complainant. On any one and all of three separate and distinct grounds the executor was fully competent to make title and in his own name to bring suit:

1. Because the legal estate by the will was expressly vested in the executor, and to the exclusion of the heirs; and by the codes of both Maryland and the District of Columbia the executor is the one to sue.

2. Because by the sale of the land there was a conversion, the title to the land was in equity in the vendee and in the purchase price in the vendor. Each was a trustee of the thing actually had and possessed for the benefit of the other ultimately and equitably entitled thereto. By this conversion the estate of decedent on his death was vested with the money, and hence the personal representative and not the heirs took, while the title to the real estate was in this personal representative, the executor, as trustee for the benefit of the vendee.

3. Because by the code of Maryland the executor, having the order of the Orphans' Court, was empowered to consummate the sale, and his deed on payment of the purchase price (coerced where necessary, as in this case, by the court as in all vendors specific performance suits), conveys a valid title free from any necessity of execution

by the heirs. A court of equity can mould its decree to meet the situation. The appellee cannot by his own default impede and prevent his getting a good title. Equity if need be will coerce him into paying and remove the obstacle he creates himself in a vain attempt to befoul his own title.

I. The Executor under the will is vested with the Legal Estate and has authority to complete Decedent's contract and convey good title without joining the heirs. By Statute he is the proper party complainant.

Sec. 327 of the Code of the District of Columbia grants executors full power to prosecute any personal action which the testator might have prosecuted, slander excepted. This section is taken substantially from Sec. 104, Art. 93 (p. 1350), of the Code of Public Laws of Maryland. Sec. 329 of the District code confers on foreign executors the same right of suit granted local executors. Sec. 81, Art. 16, Maryland code, declares the State's testamentary law shall not affect the chancery courts jurisdiction as to trusts. Caution and safe administration of his trust, however, makes it appropriate an executor should advise the probate court granting his letters of the decedent's contracts unfulfilled at the time of decease and obtain authority therefrom to proceed. Sec. 276, Art. 93 (p. 1404) of the Maryland code requires executors to obtain an order authorizing sale from the Orphans' Court granting their letters before selling property of the decedent, but Sec. 279 declares Sec. 276 shall not apply where an executor is authorized by will to make sale without application to the Orphans' Court. Whether, strictly speaking, the executor after appointment and qualification, need consult the Probate or Orphans' Court

in a case where the will gives him such broad powers as Alfred Ball's will conferred, and where what he proposes is to make conveyance of real estate already sold by decedent in his lifetime, is a question, having in view also Sec. 282, Art. 93, of the Maryland code and also Dent v. Maddox, 4 Md., 523; Montgomery v. Williamson, 37 Md., 421, and Brooks v. Bergner, 83 Md., 352. But consideration of these points is unnecessary inasmuch as the Orphans' Court was applied to and expressly authorized the executor to convey.

Putting aside, therefore, for the present, the question whether the suit is maintainable because of certain Maryland code provisions, and court orders thereunder made in the case at bar, authorizing executors and administrators to carry out their decedent's lifetime-made contracts, we contend that under the will of Alfred W. Ball the appellee as executor was vested with the legal estate of the land in controversy, and that his sole deed, without the heirs, would convey a good title. This being so, of course, they are not necessary parties complainant.

Sec. 316 A. (p. 595) Poe's Supplement to Maryland Code provides:

> "In all wills hereafter executed the real estate of every testator not specifically devised shall be chargeable with the payment of pecuniary legacies wherever the personal estate after the payment of debts shall prove to be insufficient, unless the contrary intention shall clearly appear."

Ball's estate was manifestly insufficient unless the land in controversy be considered as converted into money, consisting as shown by the record of only about $[illegible] personalty and charged with more than $[illegible]

The will of Alfred Ball confers on Executor Griffith "full and complete power and authority over my entire estate, real, personal and mixed," and empowered him "to sell my real estate of which I may die seized and possessed" * * * "at public sale after one month's notice." It then made certain specific bequests to be paid as far as possible out of the personal estate, including one of $2,000 to the church, but if the personalty be insufficient the deficit was to be made up out of the realty. Ball died seized and possessed of no real estate except the Jim Ball farm, having, as seen already, sold the land in controversy. Wills are interpreted according to popular import and not technical rules.

Phelps v. Harris, 101 U. S., 370;
Bank v. Beverly, 10 Pet. (U. S.), 532.

The will vests the executor with full and complete power and authority over the entire estate, realty and personalty. Thereby it necessarily confers on the executor the legal estate. The power conferred is inconsistent with a legal estate in the heirs. How can he have full and complete power and authority if he can exercise the same only by consent and concurrence of the heirs? The limitation that if he sells the real estate it shall be by public sale (which was a matter that troubled the trial judge) is not applicable here, where we have a sale already effected, *vide* the argument that an absolute sale and not an option resulted, and what remains is payment of the balance of the purchase price execution of a conveyance. The obvious reason for a public sale was to insure a fair market price for the property, to protect the estate. That price the decedent in the case in controversy had obtained antecedent to the making of his will. The reason for the

limitation not existing, the limitation itself has no relation to the realty in controversy but to land not here involved, namely, that derived from Jim Ball, who died prior to making of the will. The limitation is not one on the legal estate or on the power of disposition of the legal estate or on the mode of or parties to conveyance but on the manner of putting on sale. The fee is in the executor by force of the terms of the will.

> "Where an executor is empowered to sell lands he takes the fee simple."
>
> Algers Case, 78 Fed. Rep., 729;
> Hanson v. Brewer, 78 Maine, 177;
> White v. Cowing, 6 Hill, 336;
> Sandford v. Handy, 23 Wend., 260;
> Kidwell v. Brummagen, 32 Calif., 437;
> Miller v. Meetch, 8 Penna. St., 418.

The trusts and powers reposed in and conferred on the executor require vesting in him of the legal estate. In Rathbone v. Hamilton, 4 App. D. C., 475, that court held that by implication alone the legal estate was vested in the executor where the will directed that the real and personal estate be sold and the proceeds distributed in a certain manner. A comparison of the two wills shows how little room there is for a contention if that authority be deemed by this court as we think it will be, a correct exposition of the law, that in the case at bar the executor is not vested with full and ample rights and power of both action and conveyance.

> "Executors or trustees take an estate commensurate with the exigencies of their trust. Where powers given under a will require the executor to

have the legal estate the will must be held to invest him with it."

Neilson v. Lagow, 12 How., 98-111;
Webster v. Cooper, 14 How., 499;
Doe v. Considine, 6 Wall., 471;
Johns Hopkins Univ. v. Middleton, 76 Md., 188;
Franklin v. Osgood, 2 Johns, Ch. 20.

Furthermore, and quite independently, under the terms of the will, Dr. Griffith was residuary devisee for the purposes of distribution of the estate and unites in his own person the right to sue as executor by force of the statute, and the same is true of him as residuary devisee. The testator could have sued, and Griffith is in privity of estate with him by representation and also by title. What he is doing is enforcing an old contract—not making a new one.

The late Chief Justice Alvey of Maryland, in Worthington v. Lee, 61 Md., 530, thus put the legal principle: "Wherever the specific execution of a contract or covenant respecting lands would have been decreed as between the original parties, it will be decreed as between all persons claiming under them in privity of estate, or of representation, or of title." By both representation and title appellant is in privity with Ball.

See also Mundorf v. Kilbourn, 4 Md., 463.

By the will the real estate as well as personalty being charged with payment of debts, the administrator or executor was the proper party.

Thompson v. Duncan, 1 Tex., 487.

It is well settled upon general principles as well as by our statute that in an action for the specific performance of a contract made by the testator for the conveyance of land it is not necessary that the heirs should be made parties in order to bind them.

Shannon v. Taylor, 16 Tex., 413.

Execution of the contract with partial payment was a transfer in equity of the title, and by the terms of the will this title was vested in the executor.

Bissell v. Heyward, 96 U. S., 580;
Smith v. Wyckoff, 11 Paige (N. Y.), 50.

By the sale effected there was a conversion. Thereafter Ball held as Trustee of the land for Stewart. Ball's interest became personalty or a chose in action and passed to his Executor, who took title to carry out the trust.

The agreement made between Ball and Stewart was not an option but an absolute sale. The $500 paid down was, as the agreement recorded expressly stated, a part of the purchase price. The retention of possession by Ball thereafter was but as security for the payment of the balance of one-half of the purchase price and pending title examination, survey, etc. By the sale the land became appellee's and the purchase price Ball's. In equity there was a conversion of the land into money, and the fund to be derived as a result of the sale passed to the personal representatives and not to the heirs. Hence the heirs were neither indispensable nor proper parties.

Smith v. Ayer, 101 U. S., 326.

The effect of the sale made by Ball was that thereafter

in equity Ball held the land as trustee for Stewart, and Stewart the consideration money as trustee for Ball. If the contract were performed then the price paid went to the executor as personal property, and if not, the executor acquired a chose in action. The broken contract was an agreement mutually obligatory, and Stewart was as much bound to pay over the purchase price to the personal representative of the vendor as, if the purchase price had been paid, the personal representative of the vendor would have been bound to turn over the legal title to the land to the vendee for whom vendor and his personal representative were but trustees.

> "The executor becomes vested with the title to all corporeal personal property or things in possession and visible and tangible, and also with the title to incorporeal property or things in action."
>
> Hickox v. Frank, 102 Ills., 660;
> Hitchcock v. Mosher, 106 Mo., 578.

> "The vendor's interest ceases to be real estate. It becomes a chose in action, a personal demand for the consideration money, which in case of death goes to his personal representative, and the legal title is held only as a security for the payment of the debt. The vendee becomes in substance the owner of the estate. This conversion takes place notwithstanding that it may be defeated afterwards by the non-payment of the purchase money."
>
> Longwell v. Bentley, 23 Penna., 99.

> "By contract of sale of land the estate of decedent is converted into personalty, over which the personal representatives have absolute control."

In re Simmons Estate, 140 Pa., 567;
Dent v. Maddox, 4 Md., 53.

"The administrator and not the heirs of a deceased vendor of land is the proper person to bring suit for the unpaid purchase money."

Rachford v. Rachford, 13 S. W. Reps., 1075;
West Hickory M. A. v. Reed, 80 Pa., 38.

In an action for the specific performance of a contract made by the testator for the conveyance of land it is not necessary for the heirs to be made parties in order to bind them. For the purposes of such a suit the executor is the representative of the heirs.

Holt v. Clemmons, 3 Tex., 423;
Ottenhouse v. Burleson's Adms., 11 Tex., 87.

The foregoing cases came up under Texas statutes, but they are not essentially different from those of Maryland.

In Lewis v. Hawkins, 23 Wall., 126, the Supreme Court held that where an agreement is made to sell land the vendor holds the legal title as trustee for the vendee and the vendee is a trustee for the vendor as to the purchase money. The equitable estate of the vendee is alienable, descendible and devisable in like manner as real estate held by a legal title. The securities for the purchase money are personalty and in the event of the vendor's death go to his personal representatives.

In the instant case appellee is seeking to compel appellant to pay the balance of the purchase price agreed, give a mortgage for the remainder and take the land as per the deed or contract recorded by appellant.

In Meeks v. Olpherts, 100 U. S., 566, it was held the administrator was the representative of the rights of the heirs and creditors of the estate, and had the same right to sue as the intestate and had the exclusive right and duty. In that case a statute also existed, but was substantially the same as the Maryland and District statutes, and the reasoning of that case is equally applicable to the case at bar.

In Currie v. Boyer, 5 Beavans, 8, the English Court of Chancery held that where a person had contracted to sell his estate and died that there was a conversion, that in equity she had alienated the land and had acquired a title to the purchase money. The heirs-at-law were held not entitled to the estate.

See also Tye v. Tye, 88 Mo. App., 330;
Sutteer's Heirs v. Ling, 25 Pa., 466;
Krause's Appeal, 162 Pa., 18-25.

By the Code of Maryland the Executor under the Orphans' Court orders can complete the Testator's contract. The heirs are not necessary, the will being admitted. Appellee, by his default, cannot defeat his own contract and his own title. Equity will mould its decree, protect all parties and specifically enforce the contract.

Sec. 81, Art. 93, Code of Maryland, provides: "The executor or administrator including the administrator *de bonis non* of a person who shall have made sale of real estate and have died before receiving the purchase money or conveying the same may convey the said real estate to the purchaser and his deed shall be good and valid in law and shall convey all the right, title, claim and interest of such deceased person in such real estate as effectually as

the deed of the party so dying would have conveyed the same; provided the executor or administrator of the person so dying shall satisfy the Orphans' Court granting him administration that the purchaser has paid the full amount of the purchase money."

Sec. 282 of the same article specifically declares ratification by the Orphans' Court unnecessary "in any case where a court of equity of competent jurisdiction has assumed jurisdiction in relation to the sale of any such real estate."

Montgomery v. Williamson, 37 Md., 421, states the object of the power of ratification conferred on probate courts to be protection of the estate and prevention of fraud and collusion. Hence, while proper and convenient and a saving of time and expense where parties are willing to have a decedent's lifetime-made contracts carried through and title perfected in the Orphans' Court, it is not necessary and essential to do so where a court of equity, with its broader powers, takes command of the situation and protects the estate. Appellee Stewart, had he so desired, could have procured a perfect title to the land in controversy by the simple process of paying the money as he had contracted to do. No joinder of heirs concededly was necessary to the probate court's proceeding.

But, as he refused to perform his agreement, though the Probate Court in advance had passed its approval or confirmatory order, an adversary proceeding became necessary and this necessarily was brought in an equity court. The contention of appellee is that inasmuch as he refused to complete his contract he cannot be compelled to do so because by his refusal he can prevent his own acquisition of a good title, inasmuch as the land is in

Maryland and because, as he claims, the heirs must be parties to any deed and any litigation. In other words, that he can cloud his own title and by the cloud he raises destroy his own contract; that he can create a bogey and when he assumes to be frightened at it the court of equity likewise will take fright and release him from his contract; that by refusing to pay over the money he can prevent the condition precedent which would enable the executor to deliver title through the Orphans Court, and that if it be sought to compel him the executor cannot act, but the heirs are indispensable to the proceedings. That is to say, if the contract should be one advantageous and extremely profitable to the vendee, and there were a complaisant executor, the deal could be put through; but if it were profitable to the estate, and there is a reluctant vendee and an honest determined executor, it cannot be. The contention obviously ought not to prevail if it can be avoided, and aside from the two special and independent reasons of the power granted by Ball's will and of the doctrine of conversion it can be in this case for a third and equally independent reason by virtue of the statute and of the powers of a court of equity. That court always has power so to mould its decrees as to provide relief and remedy for a right.

While unnecessary in this case, the equity court could require the purchase price to be paid into court to the executor's order (Gale v. Best's Excr., 16 Wis.), and then an order obtained from the Orphans' Court of Prince George County and a deed executed before payment over of the money from the court registry, though the Orphans' Court order heretofore passed is a virtual confirmation (Livingston v. Cochran, 33 Ark., 294).

Jurisdiction existed in the Orphans' Court to pass the

orders, inasmuch as the county was the situs of the land and domicile of the decedent. Therefore, its orders are entitled to faith and credit and a presumption of their validity.

> Lloyd v. Waller, 74 Fed., 601;
> Schlee v. Darrow, 65 Mich., 362;
> Hawkins v. Hawkins, 28 Ind., 71.

Equity acts compulsory. Specific performance in its very essence is compulsory. It acts on the person and compels performance, payment of money or conveyance of property. A court of equity can compel appellee to pay the agreed purchase price. The jurisdiction of the Orphans Court is not exclusively of equity's. It is merely a simple forum for a simple matter. The requirement the moneys first must be paid is intended simply for protection of the estate. When equity compels payment and the transaction is completed under its direction the end sought is attained.

Equity can decree conveyance and enforce payment and then, the title being vested in appellant, there will be a good fee simple title in appellee.

> Muller v. Dow, 94 U. S., 444;
> Corbett v. Nutt, 10 Wall., 464.

And even though land be in another state, Orr v. Irwin, 4 N. C., 351.

> "The legislature in granting jurisdiction over real estate of decedents to orphans' court did not make such jurisdction exclusive, but has expressly reserved the jurisdiction in equity. It was the design of the legislature to save, in ordinary cases

> the expense and delay incident to chancery proceedings, but not to take away jurisdiction in equity where parties choose to invoke it."

Keplinger v. McCubbin, 58 Md., 206-13.

Had the testator lived he could have compelled the specific performance and by Sec. 104, Maryland code, and Sec. 327, District code, the executor may prosecute any personal action the testator could have, save slander, and specific performance is a personal action. Had the will been contested and a suit been necessary pending the end of the will controversy, the heirs and the executor perhaps might have been indispensable parties, but this would have been because of uncertainty as to the legal representatives. (See Spier v. Robinson, 9 How. Pr., 325.)

A case similar to that at bar is Hyde v. Heller, 10 Wash., 586-611. Caroline Heller *et vir* sold to Hyde *et al.* at a boom price certain land near Spokane, and before fulfilment of the contract and passage of a deed Caroline died. The boom having flattened, the executors sued for specific performance. Held, that the legal title to decedent's lands had vested in the executors for the purpose of passing title to her vendees under the contract of sale, that the rights of devisees or heirs in the land was confined to an interest in the purchase money due under the contract, that the executor's deed would pass a good title and that an offer to make a deed by the executor or a court commissioner constituted a sufficient tender of a deed. In the course of its elaborate opinion, the court said:

> "All the right that Mrs. Heller had in this land after she had entered into the contract of sale was

> the right to the money which represented the purchase price. . . . Her heirs under her will must take just what she had a right to devise and nothing more, and she had a right to devise what she had and nothing more. . . . It is a patent fact (speaking of the State statute, similar generally to that of Maryland) that the central idea is the enforcement of contracts according to their terms, and that the administrator is made the legal representative of the deceased to convey title. . . . And if the title vests in the administrator for the purpose of complying with the contract, it must necessarily vest there for the purpose of answering to the demands of a court of equity to convey in an action brought for the express purpose of enforcing the specific contract. . . . In fact it seems to us that a consideration of all the different provisions of the statute irresistibly forces the conclusion that the legal title vests in the administrator for the purpose of passing the title to purchasers in conformity at least with the conditions of contracts made by the testator."

In a case in Pennsylvania, *In re* Huggins Estate, 204 Penna., 167, one Huggins sold mineral rights under her land and died. Her executors sued for specific performance. The contract had required all the money to be paid before the deed should pass. The vendees alleged willingness to pay but set forth one Debbre West claimed the agreement of sale as a gift from decedent. Held: Taking all these facts as true, it leaves the equitable title in the vendees and the equitable title to the unpaid purchase money in Debbre West. The executors (p. 175) should be required to make a deed now and place it in escrow in Debbre West's hands to be delivered by her when the purchase money was paid.

In Weed v. Peck, 38 Conn., 88, B covenanted with A to

execute and deliver a good deed to land on or before a certain date and A to do the same as to another piece and $300 bonus. B died without performance or tender by either party. Held: That the agreement was binding on B's personal representatives. The court said literal performance of the contract had become impossible, but that *the substance was the sale and exchange of land and the manner merely incidental.* The administratrix *may* obtain from the court "authority to convey the estate and a conveyance under such authority will as effectually vest the estate in the plaintiff as the deed of Mr. Peck would have done had he continued to live."

See also Miller's Admr. v. Miller, 25 N. J. Eq., 354;
Fulwider v. Peterkin, 2 Greene (Iowa), 522;
Bryant v. Atlantic R. Co., 119 Ga., 608;
West Hickory Min. Asso. v. Reed, 80 Penna., 38;
In re Simmons Estate, 140 Penna., 567;
Spier v. Robinson, 9 How. P., 325;
Robinson v. Appleton, 124 Ill., 276;
Newton v. Swazey, 8 N. H., 9;
Butler v. Rockwell, 14 Colo., 125.

When the action is for money alone the heirs are not necessary.

Perry v. Roberts, 23 Md., 222.
Fry on Spec. Perf., p. 88.

As to the mere mechanics of paying the money over and getting the court order and deed, no real difficulty arises. Had appellant desired to keep his agreement (and the court has decided all questions as to his duty in this

regard in appellee Griffith's favor), all appellant had to do was to come into court and proffer the money in open court. Then appellee could have simultaneously applied for authority to turn the deed over to him, and the court's passing the order, transfer of the deed would have followed. Refusing to perform his part of the dependent conditions of the contract appellant cannot make his own breach of his contract a ground of objection. He cannot pretend to take fright at men of straw and expect equity to become panic stricken on his false alarm that a good title is endangered. Appellant having refused to perform, a court of equity, acting compulsorily, will compel specific performance and so mould the decree that appellant while compelled to keep the terms of the bargain, will be assured of his deed. Once the purchase price is compelled by the court and the executor's deed delivered, all is complete. The executor's deed is the title (Grand Coal Co. v. Clary, 59 Md.). The appellant then has the land and title and appellee the money—precisely as was contracted.

Appellant grounds his objection on the point the Orphans' Court cannot order the deed passed by the executor till appellant pays the purchase price, that this is a condition precedent; that he, appellant, refuses to pay the purchase price and create the condition precedent. This, in effect, appellee having a contract otherwise entitling him to specific performance, is to say in substance appellee *has a right but has no remedy.* The contention we submit is but sticking in the bark—*hæret in cortice.*

The principles announced are entirely consistent with Grant Coal Co. v. Clary, 59 Md., 441, on which we understand appellant relies so far as concerns our point

as to the effect of the Maryland statutes and the orders of the Orphans' Court, the arguments as to the powers conferred by the will and as to conversion being wholly independent. A careful examination of that case will show it makes for and not against appellee when applied to the record here. The one point before the court in that case was the validity as making title and as conclusive of rights of heirs of an order of the Orphans' Court where *no deed* had been executed, the order did not recite the purchase price had been paid and the petition and answers on which the order was founded were lost. The one point before the court it decided by holding the Orphans' Court was of limited jurisdiction, that proof of payment of the purchase price was a condition to its (the Orphans' Court) approving a decedent's contract, and that the title of the purchaser was derived from the deed of the executor. Appellee admits the Maryland Orphans' Court is as to some matters of limited jurisdiction and has not been clothed as in some States with jurisdiction in adversary proceedings and that it is only in amicable proceedings where the money has been paid over that it can enforce a decedent's contracts. But that does not mean an equity court cannot take jurisdiction, cannot decree the money shall be paid and the executor's deed delivered, and that the Orphans' Court cannot authorize the contract to be completed conditioned on payment of the purchase price. The jurisdiction conferred on the Orphans' Court took away none of equity's jurisdiction (Keplinger v. McCubbin, 58 Md., 206-13). The executor represents all parties in interest, *vide*, severally and separately, the will, the conversion, the statute and Dent v. Maddox, 4 Md., 523. The object of grant of power to the Orphans' Court was pro-

tection of the estate (Montgomery v. Williamson, 37 Md., 421), and that object equity can and will secure where it tries suit for specific performance.

Title made by equity's decree in this case will be complete and unimpeachable. It will be predicated on a decree of a court of competent jurisdiction, having service on the defendant in a personal action, at the suit of a party authorized by law to sue and vested by the will, the doctrine of conversion and the statute, each and all, with the right to sue, and on deed delivered after payment of the purchase price. Grant Coal Co. v. Clary, page 445. expressly states the Orphans' Court order might have furnished ground for suit in equity to compel deed from the executor.

The record shows a good, clean fee simple title. A warranty deed even tendered where none was required. No title defect and no defect in survey is shown by appellant on whom rested the burden of proof. Adverse possession alone would have been sufficient.

The agreement sought to be ordered specifically performed provided for a title search by J. K. Roberts and survey by W. J. Latimer. Both have been made. No defect is shown to exist. Imaginary possibilities or suspicions on the part of appellant cannot avail to prevent fulfillment of his contract. The best evidence no real objection to the title is entertained by appellant is that Roberts' title search with his abstract of title remained in appellant's possession from June until after Ball's death in November without any suggestion of imperfection or objection.

Appellee might rely on Roberts' report as conclusive (Allen v. Pockwitz, 103 Calif., 85). But if not conclusive, his report that the title is good certainly can be

impeached only for fraud or mistake, and the burden of showing either is on appellant, who has not sustained the burden. The same is true of the survey.

Appellant contended in the court below and may do so here the abstract of title is defective in not going back to the lord proprietary. By Sec. 76, Art. 75, Maryland code, a patent to land is presumed in favor of a party showing a title otherwise good. Roberts went back to 1792, as the record shows, and then picked up the title as it appeared to the several pieces, the abstract showing no part to start later than 1846, and that last part it is not shown has any record in Prince George County between 1792 and 1846. Counsel for appellee is informed there are no records in the county earlier than 1792. The land is situated in Maryland and in that State specific performance will be decreed on title by adverse possession (Erdman v. Corse, 87 Md., 506; Allen v. Van Bibber, 89 Md., 434, and the very recent case of Regents v. Calvary Church, 104 Md., 636). The record shows Alfred Ball had exclusive unquestioned possession of the land in controversy since his father, Henry T. Ball's death in 1877, and that Henry T. Ball had a similar possession of many years before his death. The only possible objection to the title was removed when by affidavit it was shown Elinor, wife of Henry T. Ball, predeceased him. A fanciful objection was asserted as to the Cecil deed and a claim made it does not show there were not alive other parties who should have joined in it. The Cecil deed was one of confirmation, and there is no evidence there were any other parties alive who should have joined in it. If appellant claims there were such he must prove it. Only one objection

with any possibility of merit was found by Roberts when appellee's lawyer set forth objections in December, when appellee was playing for delay, and this possibility was removed by the affidavits of Fowler and Suit, dated January 14, 1904 (Trans., p. 29) that Elinor Ball, wife of Henry T. Ball, had been dead more than thirty years.

Martindale on Abstracts of Title, Sec. 17 *et seq.*, says:

> "In the older states it is sometimes impracticable to date the abstract from the original patent. In such cases it is usual to require the title to be shown for a period of forty years at least. . . . The discretion ought to be exercised by the abstractor not to disclose the title by the abstract beyond the ordinary rules of practice. It is presumed that in all ordinary cases a title for forty years would be accepted as marketable in any of the states."

See also Sevenson v. Polk, 71 Iowa, 278.

In the instant case we have an adverse possession proven of more than sixty years and a record title of a century (the limit of records in the county), free from any proven defect or defect apparent on its face. We submit therefore that as Roberts has gone back as far as the county records run, 1792, as he was in the employ of both parties, as his abstract remained unobjected to during the entire period named in the sale agreement for completion of the contract, and never till hearing of the cause because it did not go back to the lord proprietary, and as a good possessory and record title is shown, with moreover an offer of a warranty deed, that objections to the title are frivolous and simply the ingeniousness of an unwilling purchaser.

A vendee of real estate who refuses to take title on the ground of defects must point out the objections and give proof.

Greenblatt v. Hermann, 144 N. Y., 13.

Objetcions must be substantial and reasonable. The court will not consider immaterial defects, technical objections and bare possibilities.

First A. M. E. Soc. v. Brown, 147 Mass., 296;
Hayes v. Harmony Grove Cem., 108 Mass., 400;
Foley v. Crow, 37 Md., 60;
Weems v. Brewer, 2 H. & G. (Md.), 290;
Hepburn v. Auld, 5 Cranch (U. S.), 262;
Riggs v. Pursell, 66 N. Y., 193;
Hellreagel v. Manning, 97 N. Y., 60.

Appellant has further objected that the land sold was not described with sufficient certainty. The evidence fails to disclose the slightest difficulty of identification. The surveyor, the title examiner and lifelong residents all had not the slightest difficulty on this score.

A practical location of the premises intended is sufficient to give the requisite definitions and it will be sufficient if the property intended to be conveyed can be identified by evidence properly admissible.

Kraft v. Egan, 76 Md., 243;
Hamilton v. Harvey, 121 Ill., 469;
Fowler v. Fowler, 204 Ill., 82.

As to objections to the survey such as were raised below and may be renewed and hence will be noticed by appellee's counsel, no evidence whatsoever has been introduced even tending to impeach its accuracy. The sur-

veyor was mutually agreed on, is shown to have been competent, no allegation of fraud is made against him and his report and findings, if not conclusive, certainly are entitled to every presumption in their favor and the survey must be accepted in the absence of anything in evidence contradicting it. Appellant has claimed the acreage shown by the survey and the deeds do not correspond. This would be no valid objection if true, and it is not. One of the deeds is silent as to the acreage, and it does not appear others stated the acreage as the result of a survey.

In Jackson v. Barringer, 15 Johns (N. Y.), 742, the property leased was "the farm whereon Jacobus J. Decker now lives," containing 80 acres. It in fact contained 149 acres. Held, the surplus went with the lease. "It is a well-known rule that when a piece of land is conveyed by metes and bounds, or *any other certain description,* this will control the quantity although not correctly stated in the deed." It was, said the court, described as the farm whereon Jacobus J. Decker now lives and it was reasonably and fairly to be presumed that this possession was known to both parties and that it was the farm as an entirety that was intended.

The objection the farm contained 288 acres instead of 240 acres affords no ground for refusing specific performance. The sale agreement describes the land as 240 acres more or less, it identifies the tract as the Ball farm whereon Alfred Ball now lives and inherited from Henry T. Ball, appellee's testimony shows appellant was advised Alfred Ball claimed there were nearer 275 acres in the tract than 240 acres as shown by the tax assessment books (with which records, it is apparent from the testimony appellant was familiar), that the parties agreed on a survey as the means of determining the acreage, and that appellant wanted the entire tract, even to the burial

plot of one acre. Thus a much stronger case than Jackson *vs.* Barringer *supra* is shown.

See also Goodenow v. Curtis, 18 Mich., 298;
Kraft v. Egan, 76 Md., 243;
Robeson v. Hornbaker, 3 N. J. Eq., 60;
Mansfield v. Hodgdon, 147 Mass., 304;
Barry v. Coombe, 1 Peters, 640;
Preston v. Preston, 95 U. S., 200;
Triebert v. Burgess, 11 Md., 463;
Dewey v. Spring Valley Co., 98 Wis., 83.
Algers Case, 78 Fed. Rep., 729.

Time not a bar to specific performance. Moreover, the delay here originally was due to appellant and subsequently to death.

The delay shown in the case at bar is no valid objection to specific performance. The appellant himself, as the record shows, requested the survey should be delayed until after November 7, the date set for payment of the remainder of one-half of the purchase price. He therefore cannot defend because of the delay (Brown v. Slee, 103 U. S., 828). The death of Ball necessarily occasioned delay, but appellant primarily was responsible for the delay, and subsequently his frivolous objections to the title in an effort to gain time to shape his course according to developments at the well, occasioned still further delay. There is no evidence of any delay for which appellee is responsible legally, or which should appeal to the court in the exercise of its judicial discretion—nothing of delay brought about by appellee for purposes of profiting by the added time. Indeed, the record shows unusual energy and effort by appellee to close the deal. Furthermore time was not of the essence of the contract. For strong cases on this point see:

Hosmer v. Wyoming Ry. Co., 129 Fed. Rep., 883;
Penna. Min. Co. v. Martin, 210 Pa., 56;
Wilson v. Herbert, 76 Md., 489;
Watts v. Kellar, 56 Fed., 1.

Fortuitous delay by vendor is no bar to specific performance to compel vendee to take the land.

Woodson's Admr. v. Scott, 1 Dana (Ky.), 471.

Four months' delay is not sufficent to prevent a decree for specific performance.

Wooding v. Crain, 10 Washington, 38-9;
Faulkner v. Williman, 16 S. W., 352.

Six months' delay under the circumstances not a bar.

Lawson v. Mullinix, 104 Md., 156.

The record shows appellee notified appellant of his readiness to perform and the evasion of performance by appellant. The conditions were concurrent and it was upon appellant as well as appellee to proceed with performance.

Cole v. Killam, 187 Mass., 213.

The objection on the score of the alleged difference between actual value and the purchase price of the land is wholly untenable. This evidence was inadmissible. There is no claim of false representations, or imposition, or fraud, on the part of appellee or of Ball. Appellant was entirely competent to contract, opened the negotiations himself, and paid the price named without any deception

practised against him. At the time the agreement was made the land was valuable because of the oil excitement. Had oil been discovered the land would have brought hundreds and possibly thousands of dollars per acre and at any time during November and December when boring was still in progress the land was saleable at a price based on the possible existence of oil whereas with oil drilling closed and a dry hole conceded the land was much less saleable or valuable in January and February.

Mere inadequacy of consideration, the contract being free from imposition, will not defeat a decree of specific performance.

> Cathcart v. Robinson, 5 Pet. (U. S.), 264;
> Shepherd v. Bevin, 9 Gill (Md.), 32;
> Young v. Fort, 5 Gill, 287;
> Erwin v. Parham, 12 How. (U. S.), 197;
> Md. Clay P. Co. v. Simper, 96 Md., 5.

Moreover, wherever adequacy of price is an element in specific performance the adequacy is that at the time the contract was made.

> Morrill v. Everson, 77 Calif., 114.

The claim the contract was abrogated by act of appellee or that appellee acquiesced in relief of appellant from its terms is equally untenable. The letter of appellee calling on appellant to complete the contract by the middle of November was not a termination or tantamount to a termination of the contract. It was an attempt to hurry appellant and to be able to lay matters before the Orphans' Court. But, even had it in terms declared the agreement off, it could not have had such effect. The will had not yet been probated. Griffith's authority as

agent of Ball had ceased and there was as yet no executor of the estate. At this time the contract was in abeyance pending the Probate Court's action on the will. The duty of the executor was as he was informed by Roberts, the attorney for both parties, whom he consulted when other parties came to him regarding the property in November when reports that oil would be struck were current, to lay the matter before the court and act under its orders. The appellee could not at that time have renounced any right of the estate. Ball's estate was bound by the contract and mutuality requires that appellant likewise shall be. Moreover, the record shows that appellant did not treat the contract as ended, but that in November and also in December he continued negotiations with appellee regarding the estate. Appellant still had hopes of striking oil and amassing a fortune out of the Ball land. Boring for oil was in progress clear into January and, as appellant admits, he was up in the air with hope one day and down in the depths of despair the next.

McKie v. Howland, 3 App. D. C., 478.

The testimony of Ambrose, Griffith and Roberts shows clearly that appellant was not, even as late as December, willing to adopt a decisive attitude with reference to his claims or rights under the contract or deed recorded in Ball's lifetime. He was not prepared then to live up to his contract nor yet to forfeit, if he had any such right, his $500 of down payment and end the matter. He was fighting for delay and suggesting points of doubt respecting the title that, as Ambrose testifies, necessarily involved delays and which alleged doubts as the record

evidences were but subterfuges. The title abstract had been delivered to Stewart and was in the custody of Stewart or his attorney Thomas from June 11 and yet no objection to the title was made until subsequent to the date set for payment of the balance of one half of the agreed purchase price and execution of a mortgage for the remainder. In all the dealings Thomas had acted as attorney for Stewart, at least so far as Griffith knew, and was designated as Stewart's attorney in the original letter from Stewart to Griffith. It is claimed that in the negotiations subsequent to Ball's death he acted as the oil company's secretary or attorney and that any prolongation of negotiations was by the oil company and not Stewart. Thomas himself concedes he had no authority to bind the company. The claim that it was the broken down oil company that should be made to respond and not appellant Stewart is a familiar one in the case. It was made by Stewart in his answer when he claimed the oil company as principal had been disclosed to Griffith. When confronted with his personal letter introducing Thomas to Griffith as "my (Stewart's) attorney" Stewart attempted to wiggle out of the situation by claiming the letter to be a hurriedly prepraed and carelessly signed writing and Thomas attempted to help Stewart out as to the oil company by saying on leaving he had made a parting reference to his oil company connection, but it was perfectly patent to the court Griffith did not know and it was not intended he should know he was dealing with any oil company but should be made to believe it was Stewart's personal deal. The small credence due to appellant was made apparent when appellant's witness Baughmann on cross-examination admitted the letter from Stewart introducing Thomas to Griffith had

been carefully prepared and discussed between all the oil promoters before Stewart signed it and that it was prepared to deceive. Ambrose and Griffith swear positively that in the prolonged negotiations in December they dealt with Stewart personally and nothing was said to the effect that Stewart was not the pary contracting but the oil company; they testified they did not then hear of the oil company. Stewart indeed goes so far as to claim to deny having taken any part in the prolonged negotiations and that he informed Ambrose and Griffith he wanted to be satisfied as to the title and then would complete and perform his agreement. On this point we submit Ambrose and Griffith are to be believed and not appellant. Two courts have passed on these points and each decided the conflict of testimony on the whole record in favor of appellee.

This court, there being evidence to support the view of the lower courts on the facts and the conclusion reached not being manifestly wrong, will not reach a different conclusion as to a matter of fact.

Cliff v. U. S., 195 U. S., 159;
De La Rama v. De La Rama, 201 U. S., 303.

The testimony of Mr. Ambrose and of appellee, and even the evasive testimony of appellant's attorney Thomas, shows appellant was prolonging the negotiations with a view to insisting the land was his if oil were struck and that appellee from the moment of his appointment as executor was energetic, steadfast and diligent in his insistence that the decedent's contract should be carried out by appellant.

The Contention Appellee is not Shown by Evidence to be Executor is Raised for the First Time in this Court and is Without Merit. It is a Final Attempt to Catch a Straw and Avoid Performance.

In the brief filed in this court the new counsel for appellant make a contention for the first time that the two lower courts erred for the reason that there is no proof appellee is executor. We respectfully submit the contention cannot as matter of law be sustained and be raised here for the first time and that as matter of fact the record abundantly proves that appellee is the executor and that that matter never was in dispute.

Complainant's exhibit A 3, record 13, which was duly offered in evidence letter, shows the appointment of Griffith as Alfred Ball's executor and Exhibit A 4, page 15, sets forth not only the appointment but the qualification of Griffith as executor, and there is the order of court authorizing him as executor to complete the sale made by Ball in his lifetime. Griffith testified without objection that he was executor and in his cross-examination he was asked by appellant's counsel to state, and later did state, the money which had come into his hands as executor of Alfred Ball's estate from the personalty of said estate. Elsewhere through the record are other proofs of executorship, including the abstract of title prepared by Roberts in December at appellant's request and to which no objection was made by appellant on the score Griffith was not executor as set forth therein. There is no exclusive mode, by statute or otherwise, of proving *the fact* a party is executor.

Appellant did not, as asserted in appellant's latest

brief, by his answer put in issue the office of appellee Griffith as executor. He did, as the answer, page 39, shows say he was advised appellee had no right as executor to bring or maintain suit against appellant. But this is quite different from specific assertion that appellee was not executor.

Sec. 1535 of the Code of the District of Columbia provides: "If either party wishes to deny the right of any other party to claim as executor, or as trustee, or in other representative capacity, or as a corporation, he shall deny the same specially under oath, unless for cause shown he obtain leave of the court to make such denial without oath."

Appellant's duty in any event would have been to have objected to secondary evidence that appellee was executor,

> U. S. v. Moreno, 1 Wall., 400;
> Pennock v. Dialogue, 2 Pet., 1.

and to have raised any points of evidence as to matters that could have been cured by more formality of proof at the time evidence was offered which appellant considered not strict proof.

> Patrick v. Graham, 132 U. S., 627;
> D. C. v. Woodbury, 136 U. S., 450.

The point, as stated, has no merit in fact and in law could not be here raised for the first time.

The labored attempt of appellant to impeach the proceedings of the Probate Court of Maryland under whose authority Griffith acted as executor is vain. It is true the Probate or Orphans' Courts of Maryland have limited

jurisdiction but this jurisdiction as to probate of wills and the grant of letters of administration has been absolute in Maryland since 1798; see Art. 93, Maryland Code, Secs. 40 and 331. The Orphans' Courts of Maryland moreover are provided for in the state constitution and have full powers wherever their jurisdiction extend. The Maryland courts have decided frequently that the facts upon which this jurisdiction is based cannot be inquired into in any collateral proceeding.

> See Raborg v. Hammond, 2 Harris & Gill, 42;
> Wilson v. Ireland, 4 Md., 448;
> Stanley v. Safe Dep. Co., 87 Md., 453.

The case of Emmart v. Stouffer, 64 Md., cited by appellant so far as the instant case is concerned is thus disposed of in the opinion of Chief Justice McSherry in the Stanley case last cited:

> "If it had a right to decide the question of residence, then it had the right to determine whether it had jurisdiction to admit the will to probate, and if it decided that preliminary question erroneously its decision was subject to review on appeal or to reversal by the court itself upon proper application made to it for that purpose in due season. Raborg v. Hammond, 2 Har. & G., 48; Schultz v. Houck, etc., 29 Md., 26. The evidence upon which it based its decision could not be looked to by this court (even if it were in the record) to determine whether the Orphans' Court correctly decided the question of residence, except upon an appeal from that decision, and there is no such appeal before us. The subject being within the court's jurisdiction all acts done as consequence of and pursuant to its decision on a matter of fact that gave it the right to exercise that juris-

diction, are valid until reversed on appeal or set aside by its own order, even though it should subsequently appear that the conclusion reached on that matter of fact was not actually warranted. Wilson, Admr. v. Ireland, 4 Md., 448."

In conclusion, we desire to direct the court's attention to the fact that if the terms of the decree originally signed by the court in this case in appellee's favor be executed that the contract will be enforced according to its terms and each and every person interested will get precisely what he or she should under the contract and the will. To avert this result appellant has endeavored to cloud his own title, to deny his own contracts and to endeavor to raise clouds of suspicion that may serve for a claim this is not a case for the exercise of judicial discretion by compelling specific performance. We submit that specific performance where a contract has been fairly made, is a matter of right and that unproven allegations of fact and unfounded claims as to the law constitute no bar.

Respectfully submitted,

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